TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 236.

JOSEPH A. SAWYER AND NELLIE A. SAWYER, PLAINTIFFS IN ERROR,

vs.

DANIEL S. PIPER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JANUARY 26, 1904.

(18,374.)

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1 STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

For his complaint herein said plaintiff respectfully alleges:

That on the 19th day of February, A. D. 1895, and at all times prior thereto herein set out, the said defendants, Joseph A. Sawyer and Nellie A. Sawyer, who then were and still are in relation to each other husband and wife, were the owners in fee and in possession of the following-described lands in said county of Steele, and State of Minnesota, to wit: The south half of the southwest

2 quarter, and the northeast quarter of the southwest quarter and the west one-fourth of the southeast quarter of section twenty-one (21), northwest quarter and the undivided one-half of the west half of the northwest quarter of the southwest quarter of section twenty-eight (28), and the northeast quarter and the north half of the southwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), and the north half of the northeast quarter, and the north half of the northwest quarter and the southwest quarter of the northwest quarter of section thirty-two (32) all in township one hundred and seven (107) north, range twenty (20) west containing in all seven hundred and ninety acres, more or less.

That on the 21st day of July, A. D. 1890, said defendant, Joseph A. Sawyer, and Nellie A. Sawyer his wife, being justly indebted to one Sarah L. Willis to the amount of five thousand dollars ($5,000), said Joseph A. Sawyer did execute and deliver to Sarah L. Willis his promissory note of that date, with interest coupons attached duly executed, whereby he promised to pay to the order of said Sarah L. Willis the principal sum of five thousand dollars ($5,000) five years after said date, with interest thereon payable semi-annually, on July 21st and January 21st of each year, at the rate of seven per cent. per annum, and interest upon each of said coupon interest notes to be paid also after due at seven per cent. per annum and to secure payment of said promissory note and interest coupon notes, said Joseph A. Sawyer and Nellie A. Sawyer, his wife, did at the same time duly execute and deliver their mortgage deed to said Sarah L. Willis of so much of said lands as are described as follows: The southwest

3 quarter of the southwest quarter, and the east one-half of the southwest quarter and the west half of the southwest quarter of the southeast quarter and the west half of the northwest quarter of the southeast quarter of section twenty-one (21) and the northwest quarter of section twenty-eight and the southeast quarter of the

northwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), all in township one hundred and seven (107), range twenty (20). That in and by said mortgage it is stipulated that in case of foreclosure thereof an attorney's fee of seventy-five dollars ($75) shall be included and paid. That no part of said notes has been paid except only the interest thereon up to January 1st, 1894 save only as installment payments were made on the agreement hereinafter set out. That afterwards, pursuant to the agreement hereinafter set out, this plaintiff did, on the 3rd day of July, A. D. 1895, purchase the said notes and mortgage from said Sarah L. Willis, who did, by an assignment thereof in writing duly sell, assign and set over to this plaintiff the said notes and mortgages, and plaintiff is now the owner and holder thereof, and there is now due to plaintiff thereon the sum of five thousand five hundred and sixty and $\frac{6}{100}$ ($5,560.06) dollars and interest at seven per cent. from and after the 21st day of July, 1895, on five thousand five hundred forty-five and fifty one-hundredths ($5545.50) dollars save only as affected by the installment payments under the agreement hereinafter set out. That at the date of the agreement of February 19th, 1895, hereinafter set out, there was due on said notes and mortgage the sum of five thousand four
4 hundred and five and $\frac{90}{100}$ ($5405.90) dollars. That said mortgage was duly recorded in the office of the register of deeds of said Steele county on the 9th day of September A. D. 1890, at 9 o'clock a. m., in Book 0 of Mortgages, on page 174, and said assignment thereof was duly recorded in said register's office on the 6th day of September, A. D. 1895 at 1 o'clock p. m. in Book Y of Mortgages on page 427. That on the first day of April, A. D. 1892, the defendants, Joseph A. Sawyer and Nellie A. Sawyer, being justly indebted to one L. C. Woodman to the amount of eleven hundred dollars ($1,100), said Joseph A. Sawyer did execute and deliver to said L. C. Woodman his promissory note of that date, with interest at the rate of eight per cent. per annum, whereby he promised to pay to the order of L. C. Woodman, the principal sum of eleven hundred dollars on the first day of May, 1892, with interest thereon at the rate of eight per cent. per annum, and to secure the payment of said promissory note and interest said Joseph A. Sawyer did, at the same time, duly execute and deliver his mortgage deed to said L. C. Woodman of so much of the lands first herein described as are described as follows, to wit: The north half of the northwest quarter of section thirty-two (32) in range one hundred and seven (107) north of range twenty (20) west, which mortgage was given to secure a part of the purchase price of said premises, and that in and by said mortgage it was stipulated and agreed that in case of foreclosure thereof an attorney's fee of fifty dollars shall be included and paid. That no part of said note has been paid except only the interest thereon up to April 1st, A. D. 1893, save only as installment payments were made on the agreement hereinafter described and
5 set out. That thereafter this plaintiff did on the 31st day of January, 1895, purchase the said note and mortgage from said L. C. Woodman, and he did by an assignment thereof in writing

duly sell, assign and set over unto plaintiff the said note and mortgage and plaintiff is now owner and holder thereof, and there is now due the plaintiff thereon the sum of eleven hundred dollars and interest at the rate of eight per cent. per annum from and after April 1st, 1893, save only as affected by the installment payments under the agreement hereinafter set out. That on the day of the agreement of February 19th, 1895, hereinafter set out, there was due on said notes and mortgage the sum of twelve hundred sixty-five and $\frac{69}{100}$ ($1,265.69) dollars. That said mortgage was duly recorded in the office of the register of deeds of said Steele county, on the 7th day of November, 1892, at 3 o'clock p. m., in Book Z of Mortgages, on page 91, and said assignment thereof was duly recorded in said register's office on the 5th day of February, 1895, at 2 o'clock p. m., in Book Y of Mortgages, on page 394.

That on the 23rd day of January, A. D. 1894, said defendants, Joseph A. Sawyer and Nellie A. Sawyer, being justly indebted to this plaintiff, Daniel S. Piper, to the amount of twelve thousand dollars, said Joseph A. Sawyer did execute and deliver to this plaintiff his promissory note on that date, whereby he promised to pay to this plaintiff or order the principal sum of twelve thousand ($12,000) dollars one year after date with interest thereon at the rate of six per cent. per annum, and to secure the payment of said promissory note and interest said Joseph A. Sawyer and Nellie A. Sawyer, his wife, did at the same time duly execute and deliver their
6 mortgage deed to plaintiff of so much of the lands first above described as are described as follows, to wit: The south half of the southwest quarter, the northeast quarter of the southwest quarter and west half of west half of the southeast quarter of section twenty-one (21) and the northwest quarter of section twenty-eight (28) and the northeast quarter and the north half of the southwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), and the north half of the northeast quarter and the north half of the northwest quarter and southwest quarter of northwest quarter of section thirty-two (32) all in township one hundred and seven (107), north of range twenty (20) west, containing in all eight hundred acres, more or less. That in and by said mortgage it is stipulated that in case of foreclosure thereof an attorney's fee of one hundred dollars shall be included and paid. That no part of said note or interest has been paid save only as installment payments were made on the agreement hereinafter set out. And plaintiff is now the owner and holder thereof and there is now due the plaintiff thereon the sum of twelve thousand ($12,000) dollars and interest at six per cent. per annum from and after the 23rd day of January, 1894, save only as affected by the installment payment hereinafter set out. That at the date of the agreement of February 19th, 1895, hereinafter set out, there was due on said note and mortgage the sum of twelve thousand seven hundred and eighty dollars ($12,780). That said mortgage was duly recorded in the office of the register of deeds of said county, on the 30th day of July, 1894, at 8 o'clock a. m. in Book Z of Mortgages page 487.

That on the 1st day of November, 1893, the defendants,
7 Joseph A. Sawyer and Nellie A. Sawyer, his wife, being justly indebted to one August Deats to the amount of three thousand dollars ($3,000), said Joseph A. Sawyer did execute and deliver to said August Deats his promissory note of that date with interest thereon at the rate of six per cent. per annum, whereby he promised to pay to the order of August Deats the principal sum of three thousand dollars ($3,000) one year after said date with interest thereon at the rate of six per cent. per annum and to secure the payment of said promissory note and interest, said Joseph A. Sawyer and Nellie A. Sawyer did at the same time duly execute and deliver their mortgage deed to said August Deats of so much of the lands first hereinbefore described, as is described as follows, to wit: The north half of the northeast quarter, the southwest quarter of the northeast quarter and the north half of the southwest quarter of section twenty-nine (29) township one hundred and seven (107) north of range twenty (20) west, containing in all two hundred acres of land more or less. That in and by said mortgage it is stipulated that in case of foreclosure thereof an attorney's fee of fifty dollars shall be included and paid. That no part of said note has been paid except the interest to November 1st, 1894, save only as installment payments were made on the agreement hereinafter set out. That on the 10th day of November, 1894 this plaintiff did purchase said note and mortgage from said August Deats, who did by an assignment thereof in writing duly sell, assign and set over unto this plaintiff the said note and mortgage, and plaintiff is now the owner and holder thereof. That there is now due the plaintiff thereon the sum of three thousand dollars ($3,000) with interest thereon at the rate of six per cent. per annum since the first
8 day of November, A. D. 1894 save only as affected by the installment payments under the agreement hereinafter set out. That at the date of the agreement of February 19th, 1895, hereinafter set out there was due on said note and mortgage the sum of three thousand and fifty-four dollars ($3,054). That said mortgage was duly recorded in the office of the register of deeds of the county of Steele, Minnesota, on the 20th day of January, A. D. 1894, at 4 o'clock p. m., in Book Z of Mortgages, on page 353, and said assignment thereof was duly recorded in said register's office on the 10th day of November, A. D. 1894, at 2 o'clock p. m., in Book Y of Mortgages on page 387.

That the mortgages hereinbefore set out and owned by plaintiff constitute all the mortgages on the premises first hereinbefore described on the date of said agreement, to wit, on the 19th day of February, A. D. 1895, or at any time since, and that plaintiff is the owner and holder of each of the same and that each of said mortgages remains wholly unsatisfied of record, and they are the mortgages referred to in said agreement which is hereinafter set out.

That on the 19th day of February, A. D. 1895, said Joseph A. Sawyer and Nellie A. Sawyer were justly indebted to this plaintiff in the full amount of twenty thousand and four hundred dollars ($20,400) as recited in the agreement hereinafter set out, and to a

much larger amount, for and on account of the several notes and mortgages hereinbefore set out as will appear therefrom, but then estimated at twenty thousand and four hundred ($20,400) dollars, and did in consideration thereof duly execute and deliver to plaintiff a deed of warranty of all said lands conveying the same to plaintiff. That at the same time and as parts of the same
9 transaction the said Joseph A. Sawyer and Nellie A. Sawyer of the one part, this plaintiff of the second part, and the said defendant L. C. Woodman, as a depositary of the deed in escrow hereinafter recited of the third part did make and enter into an agreement in writing, in the words and figures following, to wit: "This agreement made on the 19th day of February, A. D. 1895, by and between Joseph A. Sawyer and Nellie A. Sawyer, his wife, of the town of Owatonna, Steele county, Minnesota, parties of the first part, and D. S. Piper, of the town of Medford in said Steele county, party of the second part, and L. C. Woodman, of the city of Owatonna in said Steele county, witnesseth, That in consideration of certain indebtedness held by said party of the second part against said party of the first part, secured by mortgages upon the lands hereinafter described and in consideration that the said second party has taken and does herewith pay and take assignments to himself of all other mortgages upon said lands or any part thereof and in consideration of the agreement herein contained on the part of said second party to be kept and performed, said party of the first part shall, and do by indenture delivered herewith, convey to said party of the second part all those tracts and parcels of land situate in said town of Owatonna, in said Steele county, to wit: The south half of the southwest quarter and the northeast quarter of the southwest quarter and the west fourth of the southeast quarter of section twenty-one (21) and the northwest quarter and the undivided half of the west half of the northwest quarter of the southwest quarter of section twenty-eight (28) and the northeast quarter and the north half of the southwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29) and the north
10 half of the northeast quarter and the north half of the northwest quarter and the southwest quarter of the northwest quarter of section thirty-two (32), all in township one hundred and seven (107) north of range twenty (20) west, containing seven hundred and ninety (790) acres of land more or less. In further consideration of the premises said parties of the first part hereby agree to and with said second party that they will pay to him the full sum of one hundred dollars per month payable on or before the last day of February, A. D. 1895 and on or before the last day of each and every month thereafter continuously. Said Sawyer to pay the taxes on said lands for 1894 and to work out the highway taxes thereon thereafter, said party of the second part to pay all other taxes thereon and to keep the buildings insured in his favor for such sum as may be agreed upon from time to time and in default of any agreement in such sums as he may elect. Said party of the second part executes and delivers in escrow to said party of the third part as depositary a deed of warranty of all said lands run-

ning to said parties of the first part or either of them, as grantee, said deed to be held in escrow by said L. C. Woodman until said party of the first part shall have paid to said party of the second part all said monthly payments above stated, and also the sum of twenty thousand and four hundred dollars ($20,400) said payment of said principal sum to be made at such time or times as may be determined by said parties of the first part they having privilege of paying any sum of not less than fifty dollars at any time thereon. It being agreed and understood that said parties of the first part shall become entitled to the delivery to them or their assigns of said deed held by said third party in escrow as above at any time whatever pro-
11 vided only that they continuously pay said $100 monthly and also pay said sum of $20,400 in time and manner as above, and it is further provided that said monthly payments shall be diminished from and after any payment upon said $20,400 in the same proportion which the sum or sums paid thereon bear to said total sum of $20,400. Provided further, that upon failure by said party of the first part to pay said monthly payments, all their rights hereunder shall cease and determine. It is further understood that the several agreements and covenants herein shall extend to and be binding upon the several executors, administrators, heirs and assigns of the several parties hereto. Also that any sum or sums received under such policies of insurance by said second party shall, in case of the payment of the remainder of said $20,400 by said first parties, be held to be a part payment thereon to the amount of the net sum or sums so received. This agreement executed and delivered in triplicate. Interlineations and additions written in red ink were so written before execution thereof.

JOSEPH A. SAWYER.
NELLIE A. SAWYER.
DANIEL S. PIPER.

I accept the within-described deed upon the terms described above.

L. C. WOODMAN.

Dated February 19th, 1895.

That on said same day and as a part of the same transaction plaintiff did make, execute a deed of all said lands to said Nellie A. Sawyer, as provided in said agreement, and deliver the same in escrow to said defendant, L. C. Woodman, who still holds the same as depositary; that said plaintiff has in all respects fulfilled and complied with said agreement on his part, and has purchased and taken
12 an assignment to himself of said other notes and mortgages hereinbefore set out, pursuant to said agreement and now owns and holds the same. That said parties of the first part have made default in the conditions of said agreement and have wholly failed and refused, and do still fail and refuse to perform its conditions on their part to be performed, in that they have failed and refused, and do fail and refuse, to pay the installments of one hundred dollars which became due and payable under said agreement on the

ast day of January, A. D. 1896, and also each and every installment that became so due and payable thereunder on the last day of each and every month thereafter up till the present time, and every part thereof but that they did pay to plaintiff in monthly installments under said contract, up to the last day of December, A. D. 1895 sums amounting in all to eleven hundred dollars and no more.

That said lands constitute a valuable and improved farm, but that the entire value thereof is less than the whole amount so still due and unpaid to plaintiff under said transaction according to the terms of said agreement and that the same is in possession and occupancy of said Joseph A. Sawyer and Nellie A. Sawyer. That both said Joseph A. Sawyer and Nellie A. Sawyer are wholly insolvent. That before the commencement of this action this plaintiff did declare to said Joseph A. Sawyer and Nellie A. Sawyer the forfeiture by them of all their rights under said agreement and that they had ceased as provided thereby by reason of their said failure to pay said monthly payments, and did demand of them possession of said lands, and did also demand of said L. C. Woodman the delivery up of said
13 deed of escrow to plaintiff, all of which has been and is refused. That the whole amount actually due to plaintiff on all said matters, is the sum of twenty-three thousand and eight hundred and thirty and $\frac{40}{100}$ dollars, ($23,830.40) and interest upon twenty-one thousand six hundred and forty-five and fifty one-hundredths dollars ($21645.50) from and after this 21st day of April, A. D. 1897.

Wherefore plaintiff prays for judgment herein to the effect that by reason of said default on the part of said Joseph A. Sawyer and Nellie A. Sawyer to perform said agreement on their part, the whole of the sums so due upon said several mortgages and notes, and referred to in said agreement are now due and payable, and for judgment determining the amount due thereon, including said stipulated attorneys' fees and costs of suit, and for judgment of strict foreclosure of said contract and all said mortgages, forever barring said parties of the first part and all persons claiming or to claim by, through or under them of all right, title and interest in all said lands, unless redeemed by the payment of the amount so adjudged to be due thereon with interest within one year after such judgment, and that said deed of escrow be cancelled. Or in case the court shall deem it inequitable to so adjudge a strict foreclosure thereof as above prayed for, then that said contract and all said mortgages be by and under the judgment of this court foreclosed by sale of said mortgaged premises to satisfy the amount so adjudged to be due thereon together with costs of suit, stipulated attorneys' fees and costs of sale, subject to redemption as provided by law; and for judgment for said stipulated attorneys' fees so provided for in said sev-
14 eral mortgages and for costs and disbursements, and for such other further relief as to the court may seem just and equitable.

Dated at Owatonna, Minn., April 21st, 1897.

WHEELOCK & SPERRY,

Plaintiff's Attorneys, Owatonna, Minn.

Complaint duly verified by plaintiff on April 27th, 1897.

Answer; Venue; Title.

For their separate answer herein the above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer:—

I.

Admit that on the 19th day of February, A. D. 1895, the plaintiff was the owner and holder of the two mortgages with the notes thereby secured, described in folios 14 to 19 of the complaint and that on said 19th day of February the parties hereto made, executed and delivered the agreement set forth in folios 24 to 33 of the complaint and that the respective deeds provided for in said agreement were made and delivered on the same day and as parts of the same general agreement. The terms and conditions of said agreement were arranged and agreed upon some days prior to the making and execution of said written agreement, which was in precise accord with, and included all the terms and conditions of said prior understanding and contract therefor. They admit that thereafter these defendants paid to plaintiff the several monthly payments under the terms of said agreement for the months of February to December inclusive, A. D. 1895. They allege that in and by said agreement the total sum, principal and interest due from these defendants or either of them, to the plaintiff, upon the payment by plaintiff
15 of all incumbrances upon any part of the premises described in said agreement, and including those then held by him was, by the mutual agreement of all parties to this action, fixed and set at the amount of twenty thousand and four hundred dollars, as stated therein, which said sum included interest upon all said sums to the said 19th day of February, 1895. These defendants admit that thereafter and in pursuance of said agreement this plaintiff paid all incumbrances upon any and all of said lands not then held by him, and took assignments of all thereof.

II.

Further, answering these defendants allege that the actual value of the said lands is much greater than the total sum, including interest, due or unpaid upon said agreement. They admit that they are the owners and in possession of all said lands, which constitute an improved farm.

III.

Further, answering these defendants aver that on or about the third day of August, A. D. 1896, this plaintiff commenced an action in this court against these defendants wherein as his cause of action this plaintiff averred that under and by virtue of the deed of said premises to him set forth in the complaint herein, he was, and ever since the date thereof had been, the owner of all said premises, and in which said former action plaintiff also set forth in full the said agreement, alleged default in the conditions thereof by these answering defendants, a declaration of forfeiture thereof by plaintiff, and

a demand theretofore made by plaintiff for the immediate possession of all said premises, in which said action this plaintiff prayed for such relief therein as he considered himself entitled to, which
16 said action now remains pending in this court. Defendants plead the pending of such action in abatement herein.

Save as hereinbefore admitted these defendants deny each and every allegation in the complaint herein contained.

Wherefore they ask that this action be dismissed.

Dated at Owatonna, Minnesota, May 17th, 1897.

J. A. SAWYER,
Attorney for Answering Defendants.

Duly verified, May 17th, 1897.

Reply.

Venue and title as above.

The plaintiff for reply to defendants' answer in the above-entitled matter.

I.

Denies each and every allegation of new matter in said answer set out.

II.

Further replying to defendants' answer plaintiff admits that heretofore and in August, 1896, plaintiff commenced an action against the defendants in which he set forth in the complaint therein that he was the owner of said premises and in which he set forth the agreement in the complaint therein, alleged default in the conditions thereof and a declaration of forfeiture by plaintiff of the possession thereof of all of said premises but denies that said action now remains pending in this court or otherwise. Further replying plaintiff alleges and charges the facts to be that subsequently to the commencement of said action and upon notice duly given and after argument thereof by the defendant, Joseph A. Sawyer, as counsel for defendants therein, and Wheelock & Sperry as counsel
17 for plaintiff therein, an order was made by the judge of the district court in said action dismissing the said action without prejudice to the plaintiff herein, which said order was dated and filed in the office of the clerk of this court on the 20th day of February, 1897. That subsequently thereto and in April 20th, 1897, judgment was duly made and entered therein by the clerk of the district court of Steele county, Minnesota, dismissing said action.

Wherefore plaintiff asks judgment as in his complaint prayed.

WHEELOCK & SPERRY,
Plaintiff's Att'ys.

Reply duly verified by the plaintiff in person.

Transcript of Evidence; Venue; Title.

The above-entitled action came on for trial before said court, Hon. Thomas S. Buckham, district judge, presiding, at the court-house in the city of Owatonna, said county and State, on the 2d day of June, A. D. 1897, Messrs. Wheelock & Sperry, and Robert Taylor appearing in behalf of the plaintiff, and J. A. Sawyer appearing in behalf of himself and Nellie A. Sawyer, and no appearance being made in behalf of the defendant, L. C. Woodman; at which time the following proceedings were had:

Mr. SAWYER: We offer to allow the plaintiff to take a decree of foreclosure in this case based upon and for the amount provided in the contract—or agreement. (Plaintiff's Ex. "E.") Which offer was declined by counsel for plaintiff.

Counsel for defendants, Joseph and Nellie A. Sawyer, admits that they were the owners of all these premises (premises involved
18 in this action) at the various times that these mortgages were given; admits that defaults have been made in the payment of the amounts due under said contract, Ex. "E;" admits that demand has been made on him for such sums which have become due under said contract Ex. "E," and admits that the only payments made are those which are alleged in the answer to have been made.

Mr. SPERRY: We offer in evidence the mortgage from Mr. and Mrs. Sawyer to Sarah L. Willis.

Mr. SAWYER: We object to that; by the pleadings the mortgage set up is merged in the agreement.

Mr. SPERRY: We also offer in connection with that the note given at the same time, as a part of the same transaction, with the coupons of the note.

Mr. SAWYER: We make the same objection.

Mr. SPERRY: We also offer the assignment of mortgage from Sarah L. Willis to D. S. Piper.

Mr. SAWYER: Same objection.

The above exhibits were marked Pl't'f's Ex. "A 1," "A 2" and "A 3."

Mr. SPERRY: We offer in connection with this the record of these instruments; first, of the mortgage found in Book 0.

Mr. SAWYER: The only objection is, not that the mortgages are not genuine, but that they are irrelevant and immaterial, because merged, under the pleadings, into the contract.

Mr. SPERRY: Continuing, the recording the Willis mortgage and notes found in Book 0 of Mortgages on page 174 is offered in evidence; and the record of the assignment in Book Y, page 427.

Also offer in evidence the mortgage and note from Joseph A.
19 Sawyer and wife to L. C. Woodman, described in the complaint, also the assignment from L. C. Woodman to D. S. Piper, (same marked Pl't'f's Ex. "B 1," "B 2" and "B 3;") also the record of the assignment of the mortgage found in Book Z of Mortgages found on page 91, and also the record of the assignment of the

mortgage, in Book Y of Mortgages, on page 394. Also the note and mortgage of Joseph A. Sawyer and Nellie A. Sawyer for twelve thousand dollars to Daniel S. Piper, (marked Pl't'f's Ex. "C 1" and "C 2.") Also the record of the mortgage found in Book Z of Mortgages, on page 467. Also the mortgage and note of Joseph A. Sawyer to August Deats for the sum of three thousand dollars, (the same marked Pl't'f's Ex. "D 1" and "D 2.") Also the record of the mortgage from Sawyer to Deats in Book Z, page 353. Also the assignment of this mortgage from August Deats to Daniel S. Piper, (Pl't'f's Ex. D 3.) And the record of the assignment in Book Y of Mortgages on page 387. We also offer in evidence the original agreement between Mr. Sawyer and Mrs. Sawyer, Mr. Piper and Mr. Woodman, bearing date the 19th day of February; 1895, (the same being Pl't'f's Ex. "E.")

Mr. SAWYER: We have no objection to the last offer Plaintiff's Ex. "E." It is admitted that the notes, mortgages and assignments, Exhibits "A 1," "A 2," "A 3," "B 1," "B 2," "B 3," "C 1," "C 2," "D 1," "D 2," "D 3," are the notes, mortgages and assignments described in plaintiff's complaint and referred to in the agreement, Ex. "E;" but we object to their admission here as irrelevant and immaterial, on the specific ground that each and all thereof were merged in the agreement, Ex. "E."

Objection is overruled by the court, and exception duly
20 taken by defendants' counsel. The exception being so taken to the admission of each of said exhibits separately.

Mr. SPERRY: We also offer in evidence the deed from Joseph A. Sawyer to Daniel S. Piper to the premises described in the complaint. (Pl't'f's Ex. "F.")

Mr. SAWYER: No objection.

Mr. SPERRY: And also the record of said deed found in Book 43 of Deeds, page 70.

Mr. L. C. WOODMAN, called as a witness in behalf of plaintiff, duly sworn, testified as follows: I am the L. C. Woodman referred to in Ex. "E," and have the deed herein described as delivered to me in escrow. Produces that deed.

Deed offered in evidence by Mr. Sperry.

Objected to by Mr. Sawyer as irrelevant and immaterial; this deed admitted and marked Pl't'f's Ex. "G."

Objection overruled to which defendants reserve an exception.

Mr. SAWYER: It is admitted that this is the deed referred to in the contract Ex. "E," subject to said objection.

The defendant, Mr. Sawyer, admits that prior to the commencement of this action the plaintiff, Piper, demanded of him the balance due on the contract set out in the complaint, or the immediate possession of the premises therein described, according to the terms of the agreement, Ex. "E," and declared to him that his rights had ceased unless he immediately paid the amount that was due.

Admitted that Mr. Piper declared the contract was forfeited unless payment was immediately made.

21 *Warranty Deed.*

This indenture, made this 19th day of February in the year of our Lord one thousand eight hundred and ninety-five, be-
22 tween Joseph A. Sawyer and Nellie A. Sawyer, his wife, of the county of Steele, and State of Minnesota, parties of the first part, and Daniel S. Piper, of the county of Steele, and State of Minnesota, party of the second part,

Witnesseth, that the said parties of the first part, in consideration of the sum of twenty-two thousand four hundred and six dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part his heirs and assigns forever all those tracts, or parcels of land lying and being in the county of Steele and State of Minnesota, described as follows, to wit: The south half (S. ½) of southwest quarter (S. W. ¼) and the northeast quarter (N. E. ¼) of southwest quarter (S. W. ¼) and the west one-fourth (W. ¼) of the southeast quarter (S. E. ¼) of section twenty-one (21) and the northwest quarter (N. W. ¼) and the undivided one-half (und. ½) of the west half (W. ½) of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of section twenty-eight (28) and the northeast quarter (N. E. ¼) and the north half (N. ½) of the southwest quarter (S. W. ¼) and the undivided half of the southwest quarter (S. W. ¼) of the southwest quarter (S. W. ¼) of section twenty-nine (29) and the north half (N. ½) of the northeast quarter (N. E. ¼) and the north half (N. ½) of the northwest quarter (N. W. ¼) and the southwest quarter (S. W. ¼) of the northwest quarter (N. W. ¼) of section thirty-two (32), all in township one hundred and seven (107) north range twenty (20) west and containing seven hundred and ninety (790) acres more or less.

To have and to hold the same, together with all the here-
23 ditaments and appurtenances thereunto belonging or in anywise appertaining to the said party of the second part, his heirs and assigns forever. And the said Joseph A. Sawyer and Nellie A. Sawyer, his wife, parties of the first part for themselves and their heirs, executors, administrators do covenant with the said party of the second part his heirs and assigns, that they are well seized in fee of the lands and premises aforesaid, and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances except those now of record thereon and the above bargained and granted lands, and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will warrant and defend.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOSEPH A. SAWYER. [SEAL.]
NELLIE A. SAWYER. [SEAL.]

Signed, sealed and delivered in presence of
W. F. SAWYER.
A. L. SPERRY.

STATE OF MINNESOTA, } ss:
County of Steele, }

On this 19th day of February, A. D. 1895, before me, a notary public within and for said county, personally appeared Joseph A. Sawyer and Nellie A. Sawyer, his wife, to me well known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] W. F. SAWYER,
Notary Public, Minn.

24 *Warranty Deed.*

This indenture, made this 19th day of February in the year of our Lord one thousand eight hundred and ninety-five, between Daniel S. Piper and Lavania M. Piper, his wife of the county of Steele, and State of Minnesota, parties of the first part, and Nellie A. Sawyer, of the county of Steele, and State of Minnesota, party of the second part,

Witnesseth, that the said parties of the first part, for and in consideration of the sum of twenty thousand four hundred dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do, by these presents, grant, bargain, sell, remise, release and convey unto the said party of the second part, and to her heirs and assigns forever, all the following-described lot, piece or parcel of land, situate in the county of Steele, and State of Minnesota, and known and described as follows, to wit: The south half (S. ½) of the southwest — (S. W. ¼) and the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) and the west quarter (W. ¼) of the southeast quarter (S. E. ¼) of section twenty-one (21) and the northwest quarter (N. W. ¼) and the undivided half (und. ½) of the west half (W. ½) of northwest quarter (N. W. ¼) of southwest quarter (S. W. ¼) of section twenty-eight (28) and the northeast quarter (N. E. ¼) and the north half (N. ½) of southwest quarter (S. W. ¼) and the undivided half (und. ½) of the southwest quarter of southwest quarter (S. W. ¼ of S. W. ¼) of section twenty-nine (29) and the north half (N. ½) of northeast quarter (N. E. ¼) and the north half (N. ½) of the northwest quarter (N. W. ¼) and the southwest quarter (S. W. ¼) of the northwest quarter (N. W. ¼) of section thirty-two (32),
all in township one hundred and seven (107) north range
25 twenty (20) west containing seven hundred ninety (790) acres more or less.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, her heirs and assigns, forever. And the said Daniel S. Piper and Lavania M. Piper, parties of the first part, for themselves and their heirs, executors and administrators, do covenant with the said party of the second part, her heirs and assigns, that they have not made, done, executed or suffered any act or thing whatsoever, whereby the above-described premises or any part thereof now or at any time hereafter shall or

may be imperiled, charged or incumbered in any manner whatsoever; and the title to the above-granted premises against all persons lawfully claiming the same from, through or under them the said parties of the first part will forever warrant and defend.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

DANIEL S. PIPER. [SEAL.]
LAVANIA M. PIPER. [SEAL.]

Signed, sealed and delivered in presence of—

EMELINE L. WHITNEY.
MYRA A. PIPER.

STATE OF MINNESOTA, } ss:
County of Steele, }

On this 19th day of February, A. D. 1895, before me, a notary public, within and for said county, personally appeared Daniel S. Piper and Lavania M. Piper, his wife to me known to be the
26 persons described in, and who executed the foregoing and within instrument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] S. M. FREEMAN,
Notary Public.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

This action being at issue and in the calendar of the June, A. D. 1897 term of this court, was, on the second day of said month, being still of said term, tried by the court, Wheelock & Sperry and Robert Taylor, Esq., appearing for plaintiff and Joseph A. Sawyer, Esq., appearing for the defendants, Joseph A. Sawyer and Nellie A. Sawyer; due proof of the service of the summons and complaint having been made on the defendant L. C. Woodman, and the usual affidavit of default having been made and filed, and no appearance by said Woodman.

I find the following as the facts duly admitted or proven on such trial:

First. That on the 19th day of February, A. D. 1895, and at all times prior thereto herein set out, the said defendants, Joseph A. Sawyer and Nellie A. Sawyer, who were then and still are in relation to each other, husband and wife, were the owners in fee and in possession of the following-described lands in said county of Steele,

and State of Minnesota, to wit: The south half of the south-
27 west quarter and the northeast quarter of the southwest quarter, and the west one-fourth of the southeast quarter of section twenty-one (21) northwest quarter and the undivided half of the west half of the northwest quarter of the southwest quarter of section twenty-eight (28), and the northeast quarter and the north half of the southwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29) and the north half of the northeast quarter and the north half of the northwest quarter and the southwest quarter of the northwest quarter of section thirty-two (32), all in township one hundred and seven (107) north, range twenty (20) west, containing in all seven hundred and ninety acres (790), more or less.

Second. That on July 21st, 1890 the defendants, Sawyer and wife, executed and delivered to Sarah L. Willis, the note and mortgage of five thousand dollars in that behalf set out in the complaint, covering and conveying the following-described lands: The southwest quarter of the southwest quarter, and the east half of the southwest quarter and the west half of the southwest quarter of the southeast quarter and the west half of the northwest quarter of the southeast quarter of section twenty-one (21), and the northwest quarter of section twenty-eight (28) and the southeast quarter of the northeast quarter, and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), all in township one hundred and seven, (107) range twenty (20) in said county. Which mortgage was recorded in the register of deeds office in said county, on the 9th day of September, 1890, at 9 o'clock a. m., in Book 0 of Mortgages,
on page 174. That said mortgage contained a stipulation for
28 the payment of seventy-five dollars as an attorney's fees in case of foreclosure thereof.

Third. That on the first day of August, 1892, said defendants, Sawyer and wife, did execute and deliver to L. C. Woodman the note and mortgage of eleven hundred dollars in that behalf set out in the complaint, covering the following-described lands, to wit: The north half of the northeast quarter of section thirty-two (32) township one hundred and seven (107) north of range twenty west in said county and State, which mortgage was recorded in the register's office on the 7th day of November, 1892, at 2 o'clock p. m., in Book Z of Mortgages, on page 91, which said mortgage contained a stipulation for the payment of fifty dollars as an attorney's fee in case of foreclosure, thereof. That on January 31st, 1895 said note and mortgage were duly assigned to the plaintiff herein, which assignment was duly recorded in said register's office on February 5th, 1895, at 2 o'clock p. m., in Book Y of Mortgages, on page 394.

Fourth. That on November 1st, 1893, said defendants, Sawyer and wife, executed and delivered to August Deats the notes and mortgages for three thousand dollars in that behalf, set out in the complaint covering and conveying the following-described lands, to wit: The north half of the northeast quarter, and the southwest quarter of the northeast quarter and the north half of the southwest quarter of section twenty-nine (29) township one hundred and seven (107) north, range

twenty (20) west, in said county and State, which said mortgage was duly recorded in the register's office on January 20th, 1894, at 4 o'clock p. m., in Book Z of Mortgages, on page 353; that said
29 mortgage contained a stipulation for the payment of fifty dollars as an attorney's fee in case of foreclosure thereof. That said notes and mortgage were duly assigned to the plaintiff on November 10th, 1894, which assignment was duly recorded in the register's office on the 10th day of November, 1894 at 2 o'clock p. m., in Book Y of Mortgages on page 387.

Fifth. That on January 23rd, 1894, said defendants, Sawyer and wife, executed and delivered to the plaintiff the note and mortgage for twelve thousand dollars in that behalf set out in the complaint, covering and conveying all the lands first hereon described, excepting the undivided half of the west half of the northwest quarter of the southwest quarter of section twenty-eight (28), township one hundred and seven (107) north of range twenty (20), west, which said mortgage was duly recorded in said register's office on July 30th, 1894 at 8 o'clock a. m., in Book Z, of Mortgages on page 467, that said mortgage contained a stipulation for the payment of one hundred dollars as an attorney's fee in case of foreclosure thereof.

Sixth. That on February 19th, 1895, said defendants, Sawyer and his wife, executed and delivered to the plaintiff a deed of warranty with full covenants of all the lands hereinbefore described and on the same date and as part of the same transaction, said Sawyer and his wife, of the first part, and the plaintiff of the second part, and the defendant Woodman of the third part made and entered into the agreement of that date, set out in the complaint, and on the same date and as part of the same transaction the plaintiff executed and delivered to the defendants Nellie A. Sawyer, a
30 deed of conveyance of all said lands to her, which was placed in the hands of said Woodman in escrow, to be delivered on the conditions set out in the said agreement, in and by which agreement the making of said deeds is recited and it is provided that plaintiff should pay and take assignments to himself of all said other mortgages on said lands, or any part of them, not already owned by him. And that said defendants, Sawyer and his wife, should pay to the plaintiff one hundred dollars per month, payable on or before the last day of February, A. D. 1895, and on or before the last day of each and every month thereafter continuously. That the said deed so placed in the hands of said Woodman in escrow should be held by him in escrow until said Sawyer and his wife should pay to the plaintiff all said monthly payments and also said sum of twenty thousand and four hundred dollars, said twenty thousand four hundred dollars to be paid at such time or times as should be determined by the said Sawyer and his wife, they having the privilege of paying not less than fifty dollars at any time thereon, and provided that the said Sawyer and his wife should become entitled to the delivery to them or their assigns of said last-mentioned deed so held in escrow at any time whatever, provided only that they should continuously pay said one hundred dollars monthly and also pay the sum of twenty thousand four hundred

dollars as above. And provided further that upon failure by the said Sawyer and his wife to pay said monthly payments all their rights under said contract should cease and determine. That the said deed from Sawyer and wife to plaintiff was recorded in the register's office on the 7th day of May, A. D. 1895, at 5 o'clock
31 p. m., in Book 43 of Deeds at page 70.

Seventh. That afterwards on the 3rd day of July, 1895, the plaintiff did purchase the said Willis notes and mortgages of five thousand dollars, which was duly assigned to him by the mortgagee, which assignment was recorded in said register's office on September 6th, 1895 at 1 o'clock p. m., in Book Y of Mortgages at page 427.

Eighth. That the defendants, Sawyer and wife, made payments to the plaintiff of the monthly installments of one hundred dollars each for eleven consecutive months up to the 31st day of December, A. D. 1895, and then made default in such monthly payments, and has made no further payments either upon said contract or upon any of said mortgages on the notes secured thereby. That the said eleven hundred dollars paid in said monthly installments is by the court applied toward payment of the said mortgage of twelve thousand dollars originally running to the plaintiff as of the dates of their payment.

Ninth. That there is due at the date of these findings on the said Willis mortgage the sum of sixty-three hundred and twenty-six dollars and forty-two cents ($6326.42), besides the attorney's fee of seventy-five dollars stipulated therein. That there is now due at the date of these findings on the said Woodman mortgage the sum of fourteen hundred and seventy-five dollars and forty-six cents ($1475.46) besides the attorney's fee of fifty dollors stipulated therein. That there is now due at the date of these findings on the said Deats mortgage the sum of thirty-four hundred and eighty-three dollars ($3483) besides the attorney's fee of fifty dollars stipulated therein.

That there is now due at the date of these findings on the said
32 Piper mortgage the sum of thirteen thousand three hundred and eighty-eight dollars ($13,388) besides the attorney's fee of one hundred dollars stipulated therein.

Tenth. That all the notes secured by said mortgages were past due before the commencement of this action; and that before the commencement of this action the plaintiff did declare to the said Sawyer and his wife the forfeiture by them of their rights under said agreement by reason of their default in making said continuous monthly payments.

As conclusion of law the court finds:

That said transaction of February 19th, 1895 did not extinguish by merger or otherwise the said several mortgages and that default having been made in the conditions of said agreement of February 19th, 1895, the plaintiff is entitled to judgment of foreclosure of each of the said mortgages for the amounts so above recited to be severally due thereon and the several attorneys' fees therein stipulated besides the costs of this action and the costs of foreclosure sale and that such foreclosures be made by sale of the lands so covered by said mort-

gages severally in accordance with the statutes in such case made and provided subject to redemption according to law.

That said deed so delivered to and held by the defendant Woodman, in escrow, shall remain in his hands, as depositary during the time allowed by law for redemption from such foreclosure sales, or till redemption from such sales be made by said defendants, Sawyer and his wife, or either of them or their heirs or assigns; and in case of such redemption by them said deed to be delivered to them their heirs or assigns, but that if such redemption be not so made
33 by them, said deed shall, after the expiration of such period of redemption be cancelled and delivered up to the plaintiff and that plaintiff have judgment herein for his costs and disbursements of that suit.

Let judgment be entered accordingly.

THOMAS S. BUCKHAM,
District Judge.

Dated July 7th, 1897.

Motion for new trial on ground that findings — not supported by evidence and are contrary to law and that judgment of dismissal should have been ordered in defendants' favor. Denied.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER ET AL., Defendants.

The foregoing-settled case, having been examined by me and found conformable to the truth, is hereby settled and allowed as the formal settled case herein. And I hereby certify that the same contains full, true and correct copies of all the pleadings, evidence, proceedings on the trial and of all motions exceptions and objections taken at the trial thereof, and of all motions and proceedings in said cause subsequent to the trial, save only defendants' motion for change in the findings and order of court thereon, which said motion and order is not included therein.

(Signed) THOMAS S. BUCKHAM,
District Judge, Steele County, Minnesota.

Filed Aug. 19, 1897.

G. W. PEACHEY, *Clerk.*

34 STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER ET AL., Defendants.

The answering defendants herein now move the court that it make the following alterations in its findings of facts, heretofore made and filed herein, viz:

(1.) Strike out all that part of the sixth finding of fact after the words:

"They having the privilege of paying not less than fifty dollars "at any time thereon."

The same being the last lines of said findings. And insert in lieu of said portion the following, the same being the precise terms of said agreement, viz:

"It being agreed and understood that said parties of the first part "shall become entitled to the delivery to them or their assigns of "said deed held by said third party in escrow as above at any time "whatever, provided only that they continually pay said $100 "monthly and also pay the said sum of $20,400 in time and manner "as above. And it is further provided that said monthly payments "shall be diminished from and after any payments upon said "$20,400 in the same proportion which the sum or sums paid "thereon bear to said total sum of $20,400. Provided further, that "upon the failure of said parties of the first part to pay said monthly "payments all their rights hereunder shall cease and determine."

"2." From the ninth finding of fact strike out the several attorneys' fees therein stated.

35 (3.) From the ninth finding of fact strike out the words:

"Sixty-three hundred and forty-eight dollars and five cents, "($6348.05)." These same being the amount there found to be due upon the Willis mortgage, and insert in lieu of said words and sum, the following words and sum: "Sixty-two hundred and thirty dol- "lars and eighty-three cents, $6230.83."

(4.) Add the following finding of fact, viz:

"That the $20,400, stated in said Exhibit 'E' was at the time of "the execution of said contract mutually fixed upon and agreed "upon by the parties as the total sum owing to plaintiff by defend- "ants Sawyer, and included all that would become due plaintiff "when he had paid and taken an assignment of all said formal "mortgages, as therein provided. That the $100 payable monthly "to plaintiff by the terms of said contract was then fixed upon as "his interest upon said $20,400. That no other sum or sums than "those included in said four formal mortgages set forth in the com- "plaint, was included in said $20,400."

Add the following finding of fact, viz:

"That at the time of the execution and delivery of said Exhibit "'E,' it was the mutual intention and understanding of the parties

" thereto that the deed, Exhibit ' F,' the deed, Exhibit ' G,' and said " contract, Exhibit 8, were substituted for and thenceforth should be " considered as replacing said mortgages, together with the lien " thereof upon the lands therein described, so far as the rights of " said defendants are concerned, and that plaintiff is not en-
36 " titled to a foreclosure of either of said four prior mortgages."

Said defendants further move the court, that it strike out each and all of its findings of law in said cause, and instead thereof make and file its findings of law therein as follows:

I.

That the contract of February 19th, 1895, together with the deed by said defendants to this plaintiff and the deed delivered in escrow, (Exhibits " E," " F " and " G,") were each and all made, executed and delivered as parts of one transaction, and together constituted an equitable mortgage made by said defendants to this plaintiff. That thereby and therein a new principal sum was mutually fixed and agreed upon as the total sum and amount then owing to plaintiff by said defendants and secured by said equitable mortgage. That the same constituted a security other and different, and upon other real estate, than said former mortgages and the land mortgaged therein. That a different rate of interest was thereby fixed upon, and other and wholly different times and manner of payment of said mortgage lien, and of the sum secured thereby, was so fixed upon and settled.

II.

That said transaction of February 19th, 1895 extinguished each and all of said prior mortgages, together with the lien thereof upon the lands therein described so far as the rights of said defendants are concerned, and that plaintiff is not entitled to a foreclosure of either of said four prior mortgages.

III.

That plaintiff, having elected at the opening of this trial, not to accept a decree herein for the foreclosure of said equitable
37 mortgage, is not entitled to any relief herein.

IV.

That defendants, Joseph A. Sawyer and Nellie A. Sawyer, are entitled to a decree herein that said action be dismissed, and to recover from plaintiff their costs and disbursements herein. Let judgment be entered accordingly.

This motion is made upon the pleadings, transcript of evidence and all exhibits and files in this case and upon the files of this court in the former action between the parties hereto set out in the answer and reply herein, and in particular that part thereof included in plaintiff's motion for amended findings therein and for leave to file an amended complaint therein including said amended complaint therewith filed. True copies of which said motion, proposed

amended findings and proposed amended complaint are hereto attached.

Dated at Owatonna, Minnesota, this 28th day of July, 1897.

J. A. SAWYER,
Att'y for said Defendants.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
vs.
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. Woodman, Defendants. } Judgment.

The cause above entitled, being an action to have the agreement of February 19, 1895 set out in the complaint and hereinafter referred to, and the rights of said defendants, Joseph A. Sawyer, and Nellie A. Sawyer, under said agreement adjudged forfeited and determined, and to foreclose the several mortgages therein re-
38 ferred to, and hereinafter recited, foreclosed, was duly tried by the court, at the court-house in said county on the 2nd day of June, A. D. 1897, during the regular June term of said court then in session, and the findings and decision of the court therein have been duly made and filed, directing the entry of judgment as herein set forth; and the plaintiff's costs and disbursements herein having been duly taxed and allowed.

Now, therefore, on motion of Messrs. Wheelock & Sperry, and Robert Taylor, attorneys for said plaintiff, it is hereby adjudged and decreed as follows:

First. That the said agreement of February 19, 1895, fully set forth in the complaint herein, and the transaction of which it was a part, did not and does not extinguish by merger or otherwise any of the notes and mortgages therein and in the complaint and findings and hereinafter set forth; that default has been made in the terms and conditions of said agreement, as in said complaint and findings recited, and that said agreement and the rights of the said Joseph A. Sawyer and Nellie A. Sawyer, thereunder be and they are determined, and have ceased.

Second. That upon the mortgage bearing date the 21st day of July, A. D. 1890, executed and delivered to Sarah L. Willis, mortgagee, by said Joseph A. Sawyer and Nellie A. Sawyer, his wife, as mortgagors, covering and conveying the following-described lands situated in said Steele county, to wit: The southwest quarter of the southwest quarter, and the east half of the southwest quarter, and the west half of the southwest quarter of the southwest quarter, and the west half of the northwest quarter of the southeast quar-
39 ter, of section twenty-one (21), and the northwest quarter of section twenty-eight (28), and the southeast quarter of the northeast quarter, and the undivided half of the southwest quarter of the southwest quarter, of section twenty-nine (29), all in township

one hundred and seven (107) north, in range twenty (20) west; and recorded in the office of the register of deeds, of said county, on the 9th day of September, A. D. 1890 at 9 o'clock a. m., in Book U of Mortgages, at page 174, and containing a stipulation for the payment of an attorney's fee of seventy-five dollars, in case of foreclosure thereof, which mortgage and the note secured thereby were, on the 3rd day of July, A. D. 1895, duly assigned to said plaintiff, Daniel S. Piper, and such assignment thereof was duly recorded in the office of said register of deeds on the 6th day of September, A. D. 1895, at 1 o'clock p. m. in Book Y of Mortgages at page 427; and upon the said note secured thereby, there is due from said defendants, Joseph A. Sawyer and Nellie A. Sawyer, the sum of six thousand three hundred and seventy-eight and $\frac{08}{100}$ dollars as principal and interest, and said seventy-five dollars, stipulated attorneys' fees, as aforesaid, and the further sum of twenty-nine and $\frac{60}{100}$ dollars, costs and disbursements of this action taxed and allowed as aforesaid.

And it is further adjudged and decreed that all of said mortgaged premises so covered by said mortgage, or so much thereof consisting of distinct tracts as may be sufficient to satisfy the amount due the plaintiff as aforesaid, including said $75 of stipulated attorneys' fees and said $29.60 costs of this action, be sold in separate parcels at public auction, within the said county of Steele where
40 said premises are situated, by the sheriff of said county, or his deputy, according to the provisions of law relating to sales of real estate on execution. That said sheriff give public notice of the time and place of such sale according to law. That said plaintiff may become the purchaser at such sale if he shall be the highest bidder thereat; and that the sheriff make due report to the court for confirmation — such sale when made, and execute and deliver to the purchaser or purchasers at such sale the usual certificate as provided by law. That out of the proceeds of such sale, after deducting the amount of his fees and disbursements on such sale, the sheriff pay to the plaintiff's attorneys the sum of seventy-five dollars, the stipulated attorneys' fees aforesaid, and the further sum of twenty-nine and $\frac{60}{100}$ dollars, the costs and disbursements aforesaid, with interest on said sums from date hereof; and also the said amount adjudged to be due to plaintiff upon said note and mortgage as aforesaid, with interest thereon from date hereof, if such proceeds of such sale be sufficient for that purpose; and if there be any surplus moneys that he bring the same into the court to abide the further order of the court. And it is further adjudged and decreed that said defendant- and all persons claiming under them be thereupon forever barred and foreclosed of all right, title and equity of redemption, in and to said mortgaged premises so sold and every part thereof, except only the right of redemption from such sale, according to law.

Third. That upon the mortgage bearing date the 1st day of April, A. D. 1892, executed by said Joseph A. Sawyer and Nellie A. Sawyer, mortgagors, to L. C. Woodman, mortgagee, covering and
41 conveying the following-described lands in said county, to wit: the north half of the northeast quarter of section thirty-two

(32) in township one hundred and seven (107) north, range twenty (20) west; and recorded in the office of said register of deeds on the 7th day of November, A. D. 1892, at 2 o'clock p. m., in Book Z of Mortgages at page 91, containing a stipulation for the payment of fifty dollars as an attorney's fee in case of foreclosure; which mortgage was on the 31st day of January, A. D. 1895, with the note secured thereby duly assigned by said Woodman to the said plaintiff, and such assignment was duly recorded in said register's office on February 5th, 1895, at 2 o'clock p. m., in Book Y of Mortgages at page 394; and upon the said note secured thereby, there is due from said defendants to said plaintiff the sum of one thousand four hundred and eighty-seven and $\frac{45}{100}$ dollars, as principal and interest, and said fifty dollars, stipulated attorneys' fees. And it is further adjudged and decreed that said last-described mortgaged premises, or so much thereof as may be sufficient to satisfy the amount due the plaintiff as aforesaid upon said last-described mortgage, including said fifty dollars of stipulated attorneys' fees, be sold at public auction, within said county where said premises are situated by the sheriff of said county, or his deputy, according to the provisions of law relating to sales of real estate on execution after giving public notice of the time and place of such sale according to law; and that said plaintiff may become the purchaser at such sale. That the sheriff make report of such sale to the court for confirmation, and execute and deliver to the purchaser thereat the usual certificate, as provided by law. That out of the proceeds of such sale, after deducting
42 the amount of his fees and disbursements on such sale, the sheriff pay to the plaintiff's attorneys the said sum of fifty dollars, said stipulated attorneys' fees, with interest thereon from the date hereof, and also the said amount adjudged to be due to plaintiff upon said last-named note and mortgage as aforesaid, with interest thereon from the date hereof, if such proceeds of such sale be sufficient therefor; and if there be any surplus moneys that he bring the same into court to abide the further order of the court. It is further adjudged and decreed that said defendants and all persons claiming under them be thereupon forever barred and foreclosed of all right, title and equity of redemption in and to said mortgaged premises so sold and every part thereof, except only the right of redemption from such sale according to law.

Fourth. That upon the mortgage bearing date the 1st of November, A. D. 1893, executed by said Joseph A. Sawyer and Nellie A. Sawyer, mortgagors, to August Deats, mortgagee, covering and conveying the following-described lands in said county, to wit: the north half of the northeast quarter, the southwest quarter of the northeast quarter, and the north half of the southwest quarter, of section twenty-nine (29) in township one hundred and seven (107) north, of range twenty (20) west, and recorded in the office of the said register of deeds on the 20th day of January, A. D. 1894, at 4 o'clock p. m., in Book Z of Mortgages, at page 353, containing a stipulation for the payment of fifty dollars as attorney fees, in case of foreclosure; which mortgage was, on the 10th day of November, A. D. 1894, duly assigned with the note secured thereby, by said

Deats to the plaintiff, and such assignment was duly re-
43 corded in said register's office, on said 10th day of November, A. D. 1894, at 2 o'clock p. m., in Book Y of Mortgages, at page 387; and upon the note secured thereby there is due from said defendants to the plaintiff the sum of three thousand five hundred and eleven and $\frac{43}{100}$ ($3511.43) dollars, as the principal and interest, and said fifty dollars, stipulated attorneys' fees. And it is further adjudged and decreed that said last-described mortgaged premises, or so much thereof consisting of distinct tracts as may be sufficient to satisfy the amount due the plaintiff as aforesaid upon said last-described mortgage including said fifty dollars of stipulated attorneys' fees, be sold at public auction within said county, where said premises are situated, by the sheriff of said county or his deputy, according to the provisions of law relating to sales of real estate on execution, after giving public notice of the time and place of such sale according to law; that said plaintiff may become the purchaser at such sale; that the sheriff shall make due report of such sale to the court for confirmation, and execute and deliver to the purchaser thereat the usual certificate as provided by law. That out of the proceeds of such sale, after deducting the amount of his fees and disbursements on such sale, the sheriff shall pay to the plaintiff's attorneys the said sum of fifty dollars, stipulated attorneys' fees, with interest thereon from the date hereof, and also the said amount adjudged to be due to said plaintiff upon said last-named note and mortgage as aforesaid, with interest thereon from the date hereof, if such proceeds be sufficient therefor; and if there be any surplus moneys, that he bring the same into court to abide the further
44 order of the court. It is further adjudged and decreed that the said defendants and all persons claiming under them be thereupon forever barred and foreclosed of all right, title and equity of redemption in and to said mortgaged premises so sold and every part thereof, except only the right of redemption from such sale according to law.

Fifth. That upon the mortgage bearing date the 23rd day of January, A. D. 1894, executed by said Joseph A. Sawyer and Nellie A. Sawyer, mortgagors, to said plaintiff, Daniel S. Piper, mortgagee, covering and conveying all the following-described lands situated in said Steele county, to wit: the south half of the southwest quarter the northeast quarter of the southwest quarter and the west half of the west half of the southeast quarter of section twenty-one (21), and the northwest quarter of section twenty-eight (28) and the northeast quarter and the north half of the southwest quarter, and the undivided half of the southwest quarter of the southwest quarter, of section twenty-nine (29) and the north half of the northeast quarter, and the north half of the northwest quarter, and the southwest quarter of the northwest quarter of section thirty-two (32) all in township one hundred and seven (107) north, in range twenty (20) west; and recorded in said register's office on the 30th day of July, A. D. 1894, at 8 o'clock a. m., in Book Z of Mortgages, at page 467, containing a stipulation for the payment of one hundred dollars as an attorney's fee in case of foreclosure thereof;

and upon the note secured thereby, there is due from said defendants to the plaintiff the sum of thirteen thousand four hundred and ninety-seven and $\frac{33}{100}$ dollars as principal and interest, and
45 said one hundred dollars stipulated attorneys' fees. And it is further adjudged and decreed that said last-described mortgaged premises, or so much thereof consisting of distinct tracts as may be sufficient to satisfy the amount due the plaintiff as aforesaid upon said last-named note and mortgage, including said one hundred dollars of stipulated attorneys' fees, be sold at public auction, within said county, where said lands are situated, by the sheriff of said county, or his deputy, according to the provisions of law relating to sales of land on execution, after giving notice of the time and place of such sale according to law; that such sheriff shall make due report of such sale to the court for confirmation, and make and deliver to the purchaser the usual certificate as provided by law. That out of the proceeds of such sale, after deducting his fees and disbursements in such sale, the sheriff shall pay to the plaintiff's attorneys said sum of one hundred dollars, stipulated attorneys' fees, with interest from this date, and also said amount adjudged to be due plaintiff upon said last-named note and mortgage, with interest from this date, if such proceeds be sufficient therefor; and if there be any surplus moneys, that he bring the same into court to abide its further order herein. It is further adjudged that said defendants and all persons claiming under them be forever barred and foreclosed of all right title and equity of redemption in and to said mortgaged premises so sold, and every part thereof, except only the right of redemption from such sale according to law.

Sixth. That the deed (in escrow) from said plaintiff to defendant, Nellie A. Sawyer, referred to in the complaint and in said findings, remain in escrow till the expiration of the period allowed by
46 law for redemption from such sales, or till redemption therefrom be made by said defendants, Joseph A. Sawyer and Nellie A. Sawyer, or either of them, or their heirs and assigns; and in case of such redemption by them said deed to be delivered to them, otherwise to be cancelled and delivered up to plaintiff; and that plaintiff recover his said costs and disbursements so taxed herein

Dated this 19th day of August, A. D. 1897.

[SEAL.] G. W. PEACHEY,
Clerk of said District Court.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

To Messrs. Wheelock & Sperry and Robert Taylor, Esq., attorneys for the above-named plaintiff, and to G. W. Peachey, Esq., clerk of the court for said Steele county:

Please take notice, that the above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer, appeal to the supreme court of the State of Minnesota from the judgment of said district court entered herein on the 19th day of August, A. D. 1897, and from the whole thereof. Reviewing also the order in said cause denying a new trial, made and entered in said cause by said district court and filed in the office of said clerk of court on the 19th day of August, A. D. 1897, and from the whole thereof.

47 Dated at Owatonna, Minnesota, this 14th day of February A. D. 1898.

J. A. SAWYER,
Attorney for said Defendants and Appellants.

Due service of the above notice of appeal is hereby admitted at Owatonna, Minnesota, this 14th day of February, 1898.

WHEELOCK & SPERRY,
Attorneys for Plaintiff.

Due service of the above notice of appeal is hereby admitted at Owatonna, Minnesota, this 14th day of February, 1898.

G. W. PEACHEY,
Clerk of Court.

Bond of appeal, duly approved by Hon. Thomas S. Buckham, district judge duly served upon plaintiff's attorneys and filed in said clerk of court's office on the 14th day of February, 1898.

48 STATE OF MINNESOTA:

Supreme Court, April Term, 1898.

DANIEL S. PIPER, Plaintiff and Respondent,
against
JOSEPH A. SAWYER ET AL., Defendants; JOSEPH A. SAWYER ET AL., Appellants.

Appellants' Brief—Assignment of Errors.

I.

The court erred in finding that the four mortgages sued upon were not extinguished by the deed and agreement of Feb. 19th, 1895.

II.

The court erred in ordering those mortgages to be fore-
49 closed and the land sold to satisfy the amount found due upon them with attorneys' fees, etc.

III.

The court erred in not finding that the equitable mortgage of Feb. 19th, 1895, was given and received in lieu and extinguishment of all former securities.

IV.

The court erred in not so construing the contract of Feb. 19th, 1895 as an absolute agreement on the part of respondent, to buy in the outstanding mortgages for the total sum, including all due on those then held by him, of the $20,400 secured by the equitable mortgage then taken by him.

V.

The court erred in not ordering judgment of dismissal.

VI.

The court erred in including in the amount it found due on the Willis mortgage interest from maturity on the several interest coupons, and the judgment is erroneous in including such interest upon interest.

VII.

The court erred in finding due the plaintiff any greater sum than the $20,400 with interest thereon accrued since January, 1896, and in ordering the lands sold to satisfy any greater sum, with costs of suit and sale, and the judgment is erroneous in like manner.

VIII.

The court erred in overruling appellants' objection to the notes and mortgages.

Statement of Facts.

Feb. 19th, 1895 the plaintiff held a mortgage on the prem-
50 ises in controversy, except one tract of ten acres, of $12,000, interest at 6 per cent., which mortgage was a first lien on part of such premises only, being subject to the others mentioned as to the other portions of the land. He then also held by assignment other of such mortgages, all then due. No showing is made either in the pleadings or evidence as to whether he then had taken assignments of more than one of the three such mortgages other than such presumption as may flow from the dates of the assignments. In all, there were four mortgages, three being on parts of the land included in the mortgage to plaintiff; of the four, interest on two was at 6 per cent., on one at 7 per cent. and on the other at 8 per cent.;

all save the Willis mortgage were then due, this W. mortgage maturing in the following July.

On that day the parties entered into the agreement set forth in the complaint, and as part of the one transaction, appellants executed and delivered to respondent a deed of warranty conveying all the lands included in any of the former mortgages, with another tract of ten acres on which there was then no lien—all owned by appellants; also respondent executed and delivered in escrow to defendant Woodman, a deed of special warranty conveying to appellant all said lands, with covenants of special warranty against respondent and those claiming under or through him. All this was done in express performance of the terms of the contract then made. Its principal conditions are, that such deeds should be executed and so delivered, the consideration of each being the $20,400, that appellants should pay to respondent the sum of $100 monthly thereafter, and the principal sum of $20,400 whenever they might desire
51 so to do, payments of $50 or more permissable at any time—certain taxes to be paid by each, insurance to be kept on the buildings. The monthly payments to be reduced proportionately upon payments on the $20,400, avails of the insurance, if any to be applied on the $20,400 if appellants paid balance, the deed left with Woodman to be delivered to appellants at any time whatever, "pro- "vided only that they continuously pay said $100 monthly and also "pay said $20,400 in time and manner as above; provided further "that upon the failure by said party of the first part to pay said "monthly payments, all their rights hereunder shall cease and de- "termine."

Thereafter, and in July, 1895, respondent took an assignment of the Willis mortgage then due. Appellants kept up the monthly payments to and including that payable in December, 1895, then defaulted. They have paid nothing on the principal. After such default, as shown and admitted in the answer and reply, respondent brought an action in ejectment, upon this contract, claiming the absolute ownership of all the lands under such deed and contract, in which he was defeated—the court finding the transaction constituted an equitable mortgage for the $20,400. Thereafter the present action was brought, for foreclosure of all the prior mortgages, including the extra interest, attorneys' fees, etc. At the opening of the trial appellants in open court offered to consent to a judgment of foreclosure of the equitable mortgage, or for the sum due thereon, which offer was expressly refused by respondent. The offer was thereafter withdrawn.

Respondent offered the several notes, mortgages and assign-
52 ments with the records thereof, the contract and both deeds, the notes, mortgages and assignments thereby objected to by appellants, on the ground that these securities were extinguished by the equitable mortgage and contract of Feb. 19th, '95. Objection overruled and exception. Testimony of defendant Woodman that he then held the escrow deed, as under the terms of that contract. On request, the default, with demand of respondent thereupon, was admitted by appellants. Respondent then rested.

Appellants offered no evidence, but submitted the case on plaintiff's showing and the pleadings.

Appellants' Position.

I.

The contract and deeds of Feb. 19th, '95 constitute an equitable mortgage, securing payment of the $20,400 therein mutually agreed upon as the total due respondent.

II.

For that sum respondent agreed to buy in the outstanding mortgages; it also included all moneys due on those he then held.

III.

But if no such agreement by him, then he held the excess over the agreed sum due on the securities then held by him, as trustee for appellants—to be expended on buying in those outstanding. He neither shows in his complaint, or evidence, the ground of moneys paid out, nor shows how much he did pay out for such. There is no presumption that he paid face value, for the contract sets out in terms the total amount on all, and in this complaint he avers that the $20,400 was then "estimated" to be the value of all.

If such be the position of respondent, then the complaint
53 does not state facts, nor the evidence contain facts, sufficient to constitute the asserted cause of action.

IV.

Notwithstanding this equitable mortgage to respondent for the total amount due on all the securities, appellants then owed to the holders of the outstanding mortgages, the sums unpaid thereon, and as to the lands, both this equitable mortgage, and such outstanding securities constituted liens thereon. The latter remained, as to such holders, unaffected.

It is plain, and plaintiff so avers in his complaint herein, that he "has taken an assignment—of said other notes and mortgages—pursuant to said agreement." Fo. 32. His rights thereunder, therefore, are defined by this contract. Also it is plain that the parties intended all these securities, other than the equitable, to stand alike or fall together, when in respondent's hands.

V.

Under the contract, at most, he can assert no claim for more than the $20,400 with interest.

VI.

Both by construction of the contract, and by the evident intention of the parties, the equitable mortgage was taken in lieu of, and extinguished the old securities in plaintiff's hands, as against appellants.

VII.

The forfeiture clause in the contract, coupled with the default admitted, did not in any manner terminate appellants' position and rights under the contract. It only terminates their right to a delivery of the escrow deed, and to the unlimited time of payment of the principal sum.

54

VIII.

Respondent having sued on those mortgages only, and having expressly refused to take a decree for the relief he was entitled to on the facts, but not by his pleadings, cannot now, on appeal shift his position, and claim to be entitled in this action to a decree for foreclosure of the equitable mortgage.

Points and Authorities.

The contract and deeds of Feb. 19th '95 constitute an equitable mortgage.

I understand plaintiff's counsel to admit this, but if not, still it is well settled that such is the fact.

Marshall *vs.* Thompson, 39 Minn., 137
Heaton *vs.* Darling, Minn. 68 N. W. R., 1088.
Niggeler *vs.* Maurin, 34 Minn., 118.

As such it is for the agreed sum of $20,400. This included the repayment to respondent for the moneys to be paid out by him to buy in the other mortgages. In other words, he was paid in advance, and assumed the risk, on one hand, and the advantage on the other, of getting them in for less, or having to pay more. All save one was then due, that one had but five months to run. Plainly another loan is here made and secured.

Having, as he alleges, taken in the outside securities "in pursuance of the contract" his rights thereunder are fixed by the contract and not by the mere assignment. He can assert none save under the contract.

Renshaw *vs.* Taylor, 7 Oregon, 315.
1 Jones Mortgages, sec. 931.

55 By the express terms of the contract, the deed to respondent, and the payment of the $20,400 there provided to be made, are "in consideration of the agreements herein contained on the part of second party (respondent) to be kept and performed." And "in consideration that second party has taken and herewith does pay and take assignment to himself of all other mortgages upon said lands."

Respondent alleges in his complaint that he has performed these agreements—"pursuant to said contract." I think these provisions constitute an express agreement by respondent to "pay, and take assignment" of those mortgages for the agreed sum of $20,400. But if not an express, it is at least plainly an implied agreement by

him so to do. It will be noted, that as is *is* usual in such cases, the contract is explicit in defining the duties of the debtors, while many of those of the creditor are left to inference.

On any other hypothesis than such agreement, respondent would hold the excess of moneys in trust, and could not speculate with such moneys. He does not claim to have paid out more than the $20,400 if as much—to allow him to recover more is to protect him in an attempt to speculate therewith. Besides his complaint states no such cause of action, as an excess payment.

Further: This contract was, and was intended to be one both operating and enforcible *in presenti*. Default by appellants was followed at once by the prescribed penalty. Had such default occurred prior to the assignment to respondent of the other mortgages, he could instantly avail himself of all remedies it provided. Plainly he could at once proceed to foreclose this equitable mortgage—but could by no possibility foreclose any he had not bought in. In that
56 case appellants could redeem by paying that entire amount and then compel plaintiff to pay and satisfy the outstanding mortgages. Or had the holders of such mortgages foreclosed thereon prior to any default to respondent by appellants, they could pay off such mortgages, and compel the application of the amount so paid upon the respondent's equitable mortgage, in payment *pro tanto*.

Again: The contract requires respondent to convey, upon full payment of the $20,400, the lands to appellants by deed containing covenants of warranty against him and all claiming through or under him. The deed he did execute is such in character and was made and executed at that time. Such conveyance by no possibility could leave any claim of lien upon the premises in him, or under either of the mortgages he had held. There is no intimation anywhere, that he could any more retain a personal claim under the notes, than a lien on the land under the mortgages. If not expressly so provided, the inference is clear and indisputable that the payment of the $20,400 with the agreed interest would be a payment in full of all respondent's claims, either as against the land or against appellants personally. It will be noted that the interest or monthly payments aggregate $1,200 annually, or six per cent. per annum on the entire sum, the same rate as was provided in the original mortgage of $12,000 to respondent, and in the $3,000 Deats mortgage, then held by him.

Being thus limited, obviously it could be of no possible interest to respondent no default by appellants occurring, whether or no he took assignments of, or paid off and had satisfied, the other mortgages except only as against possible adverse claims by third parties. As against such, mechanics' liens for instance, he would
57 be protected. But to respondents it was of interest that these mortgages should not be satisfied of record. They could not take assignments to themselves, hence the provision for assignment to respondent.

Until now I am unable to ascertain respondent's position, whether it is that the new, equitable mortgage was merely additional security, or that the contract effectuated only the forbearance by him to

exercise his rights under the old mortgage so long only as no default occurred. I therefore consider both positions.

As to the forbearance theory, it necessarily rests upon the assumption that the contract does not provide that payment of the $20,400 and interest was to be payment in full. This being not a fact, the theory fails. If it be said that the contract merely extends the maturity of those mortgages, this is but a different form of assertion of the collateral theory.

The assumption that merely collateral, or additional security was intended is effectually rebutted, in the absence of default by appellants, by the fact above shown, that respondent agreed to and did make a new loan—that he agreed to, and did in fact, buy in the outstanding mortgages for the agreed amount stated in the contract, which also included the entire amount due by agreement on the mortgages then held by respondent.

Further, it should be noted that by an express understanding the total sum due, or to become due, to respondent, is fixed,—all demands, present and prospective, are fixed—and reduced to the stated amount. A single rate of interest is agreed upon for this sum. New periods of payment are stated. Entirely different results consequent upon default, are provided. An entirely different method of satisfaction of the mortgage is fixed upon, and in part con-
58 summated by the delivery of the escrow deed. The transaction is wholly new, and clearly the result of mutual compromise, intended to merge all former and prospective rights and duties of all parties to it.

"The taking of a new note and mortgage by the mortgagee from "the mortgagor for the same debt and upon the same lands would "not discharge the lien of the first mortgage—this would be other- "wise if the second debt was created by the parties getting together "and having a settlement of mutual running accounts and other "debts, among which was the first mortgage debt, and a balance is "found due the plaintiff—this balance being put in a new note and "mortgage—that would form a new consideration, and the lien of "the first mortgage would be divested or if at that time it was the "understanding of the parties that the new was to be in full satis- "faction of the old mortgage, that would operate as a cancellation "of the first mortgage."

Walters *vs.* Walters, 75 Ind., 425–429.
1 Jones Mortgages, sec. 931.
2 Pingrey Mortgages, secs. 472–1171.
Newman *vs.* Kling, 17, So. Rep., 685.

Here we have all the essentials, and more, above. The meeting of the minds of the parties in a new settlement, a new loan and on other lands in part, and an adjustment not only of the amount due on claims then held by respondent, but for future acts and payments to be made by him.

The then intention of the parties, (not the interest of the creditor) is the test.

"It is however competent for the parties to agree that a
59 "change in the form of the mortgage debt shall operate as a "payment of the debt, although the mortgage be not cancelled in form. The question of intention in such cases always "comes in with controlling force and the intention may operate as "well to extinguish the debt as to keep it alive. If a note be taken "with the intention that it should operate as payment in whole or "in part of the debt, then the mortgage is accordingly paid in whole "or in part as the case may be.

2 Jones Mortgages, sec. 926. Cited and applied in.
Joyner *vs.* Stancill, 12 S. E. R. 912. (Sup. Ct. of N. C., 1891.)

It is settled that this intention may be deduced from the writings aided by the circumstances, and need not be expressly stated.

Plainly here, appellants never expected to pay any sum over the agreed $20,400. Unless upon default, respondent could not suppose he was entitled to more.

It appears that even in case of default by appellants, neither party then understood or expected to pay the old mortgages, nor that they were enforcible as against appellants. It cannot matter at what time such default might occur. And it is only a default in making the monthly payment of interest which is provided for. By the express terms of the contract, if these were kept up the principal sum could run indefinitely. Such default might occur when nearly all this principal had been paid—years may have elapsed—the additional interest, computed on the old mortgages has run up into the thousands—indeed the more nearly appellants paid up the greater the difference between the two amounts.

60 What is respondent's measure of damages, upon the breach by appellant?

Plainly, that he recover the amount he would have received had no default occurred, save only the enforcement of his equitable mortgage for that sum.

Now there is nothing in the contract nor in the facts tending to show any different understanding, unless it be the clause of forfeiture, that appellants' "rights hereunder shall cease and determine," and the presumption is very strong in any case that these words were not then understood as requiring payment in such case by appellants of indefinite thousands of dollars more than the agreed sum.

These words are no more than the usual expression of forfeiture in a mortgage or contract of sale. Even had it been expressed to the effect that upon default by them all appellants' rights under the contract should be null and void or should cease and determine, it could not affect their rights to pay off the entire agreed sum and that such payment be taken as in full. Once a mortgage, always a mortgage.

Holton *vs.* Meighen, 15 Minn. 70–79.
Marshall *vs.* Thompson, 39 Minn. 137–141.
Meighen *vs.* King, 31 Minn. 115*d*–118.

But by the express terms of this contract it does not purport that all appellants' rights should so terminate, but only that their right to the deed to them should then cease. That deed was delivered in escrow, its delivery to them by the depository was so limited.

Respondent has ever treated this contract as in force; and in this action or his demand the court ordered relief to him based solely upon this deed and contract, to wit, the ownership of the ten acres of land, upon which respondent has no claim save under
61 this contract. And upon default by appellants, instead of trying to enforce any of the mortgages, respondent brought action in ejectment for all these lands, claiming to be their owner under this very contract. It can hardly avail now that he claim this contract expired on such default.

If, as seems likely, respondent thought that under the contract, upon default in the payments there provided, he at once became the owner of all lands, it is not possible that he then understood he could also retain the four mortgages with the personal claims against appellants contained in the four notes.

This settlement was an account stated. An accord and satisfaction.

The entire sums, including these mortgages held by respondent, being stipulated to leave due to plaintiff, on his buying in the other mortgages, constituted an account stated, and released the mortgages.

Christofferson *vs.* Howe, 57 Minn. 67.
Hanley *vs.* Noyes, 35 Minn. 174.

The new agreement of Feb. 19th, being upon full consideration, and then so far executed that it operated in the minds of the parties as a settlement and satisfaction of the prior mortgages, it must be regarded as a valid accord and satisfaction, whether or not the new mortgage and amount so agreed upon be paid or not, and respondent was thenceforth confined to an action on the equitable mortgage.

"This may be done by surrender of the former securities, by "lease or receipt in full, or in any other mode."

Babcock & Russell *vs.* Hawkins, 23 Vt. 561–563.

62 Respondent took the new settlement and equitable mortgage in satisfaction and did not merely agree to accept payment of that sum as such.

2 Chitty Contracts (11 Am. ed.) 1124.
Gulf R'y *vs.* Harriett, 15 S. W. R. 557.
See Hosler *vs.* Hirsch, 151 Pa. St. 415–25 At. R. 52.

II.

Respondent is not entitled, in this action, to a foreclosure of the equitable mortgage.

He elected to bring action only for foreclosure of the old mortgages, and tried the case below solely on that theory and claim. Now, on appeal, he cannot be permitted to shift his ground, and demand other relief. He also on the trial below, expressly declined

to accept such relief, then offered him, though his complaint did not entitle him to claim it.

Rowell *vs.* Marcy, 47 Vt. 32.
Woodbridge *vs.* Sellwood, Minn. 67 N. W. R. 700–800.
Peteler Co. *vs.* Adamant Co., 60 Minn. 127.

"A plaintiff can succeed only upon the case made by his com-
"plaint, and not upon a different one. His evidence must prove
"the substance of the issue tendered by his pleading—as he will fail,
"no matter what else he may prove."

Bremmermann *vs.* Jennings, 101 Ind. 257 and cases cited.
4 Enc. Pl. & Pr., 601–602 and cases cited, notes.
O'Brien *vs.* St. Paul, 18 Minn. 176.
Benson *vs.* Day, 40 Minn. 445.
Dennis *vs.* Spencer, 45 Minn. 250.

In Hatch *vs.* Coddington, 32 Minn. 94–95, the court, by Mitchell judge, say—

"The relief granted must be upon facts established by the
63 "evidence, admissable under the complaint, and consistent
"with the case made by the complaint." (In italics in the opinion.)

Crosby *vs.* Farmer, 43 Minn. 462 is consistent. There the ground of the relief granted was held to be "consistent with the case made."

S. W. Eddy Stock Co. *vs.* Blackburn, (C. C. A.) 70 Fed. R. 949.
Cook *vs.* Arnold, 36 S. W. R. 343. 27 Ala. 337–38 Ala. 627.

Respondent cannot complain though his action be dismissed. He first brought suit in ejectment and for damages, in which the contract and deed here involved was decided to constitute an equitable mortgage, shown by the pleadings herein. He then voluntarily and advisedly entered a court of equity upon claims.

First. Of a personal liability, which he had, upon full consideration, released.

Second. Demand for attorneys' and foreclosure fees in each of the four mortgages, to avoid which (in part) the new mortgage was executed, and thereby the parties had expressly excluded.

Third. A demand for more than two thousand dollars of principal over the amount fairly agreed upon.

Fifth. Rates of interest largely in excess of that mutually fixed upon. If, through desire to obtain these inequitable amounts, he fall outside the walls, no blame can attach.

See 1 Am. Eng. Enc. Law, 457, note bottom page.
Rowell *vs.* Marcy, 47 Vt. 627.

The results of enforcement of the older security, being thus unjust and inequitable, equity will not allow such enforcement, but
64 will consider them extinguished.

Star *vs.* Ellis, 6 John. Ch. 393–'5.
1 Jones Mortgages, sec. 863, 864.
Note 5 Am. St. Repts. p 706.

III.

There being no evidence of any demand for payment of the interest coupons at or after maturity, it is error to include in the amount found due thereon, interest on those coupons. Appellants move the court below to exclude such interest. Denied.

It is submitted that the judgment appealed from should be reversed, and the action dismissed.

J. A. SAWYER,
Att'y for Appellants.

65 IX.

Error in the first subdivision of the judgment (fo. 169 P. B.) in that it is there adjudged, "The said agreement of Feb. 19th, 1895, and the rights of said Joseph A. Sawyer and Nellie A. Sawyer thereunder, be and they are determined and they have ceased."

X.

The court erred in ordering the deed held in escrow, (fo's 126 to 130) to be cancelled and delivered up to plaintiff in case of no redemption, and this error is included in the judgment in that such delivery and cancellation is therein adjudged. (fo. 192.)

66 STATE OF MINNESOTA:

Supreme Court, April Term, 1898.

DANIEL S. PIPER, Plaintiff and Respondent,
against
JOSEPH A. SAWYER ET AL., Defendants; JOSEPH A. SAWYER *et al.*, Appellants.

Appellants' Reply Brief.

I.

Respondent's demand, that in case the judgment appealed from be not sustained, they be allowed to demand in this action a
67 foreclosure of the equitable mortgage, involves an attempted total change of base on his part, and is inadmissible.

He not only did not seek such foreclosure in the court below, but planted himself upon grounds wholly antagonistic to those requisite to such relief. The theory of his case is that no such mortgage exists—that the contract of Feb. 19th, and all appellants' rights thereunder had "wholly ceased and determined." This is alleged in the complaint, found as a fact in the findings and in set terms embodied in the judgment. In the complaint, (fo. 21) he avers that the four formal mortgages, therein prayed to be foreclosed, constitute all the mortgages on the lands at any time at or since the date of the contract. Also, (fo. 34) "that before the commencement of this action "plaintiff did declare to said Sawyers the forfeiture by them of all "their rights under said agreement, and that they had ceased as

"provided for—and did demand of them possession of said lands, "and did demand of said L. C. Woodman the delivery up of said "deed of escrow." He claimed nothing under the equitable mortgage. The relief prayed for is, (1) that the old mortgages were due and payable. (2) Judgment for the several sums claimed to be due thereon with the four attorneys' fees; (3) a strict foreclosure of those securities, or, (4) a sale of the lands to satisfy such mortgages only. While in terms he did pray—"judgment of foreclosure of said con- "tract and all said mortgages," he makes plain just what he does demand, as to the equitable mortgage by the terms immediately following, viz.: "Forever barring said parties of all right, title and "interest in all said lands." The only relief sought as to that
68 mortgage thus being a judgment of forfeiture of all rights under that contract. Also, at the trial, when offered a judgment of foreclosure of that mortgage without contest, he expressly refused to accept it.

This identical theory is carried into the findings and judgment, both drawn by respondent's counsel. The findings set forth the several sums due by the terms of the formal mortgages, but nothing as to the sum secured by the equitable lien. Then recite the making of the contract with the two deeds. Then, (fo. 146), "And pro- "vided further, that upon failure by said Sawyer and his wife to "pay said monthly payments all their rights under said contract "should cease and determine." Then, (fo. 150), the declaration of forfeiture by plaintiff to appellants of all rights in them under the contract.

In the first clause of the judgment, (fo. 169), is the following adjudication—"That default has been made in the terms and condi- "tions of said agreement, as in said complaint and findings recited, "and that said agreement and the rights of said Joseph A. Sawyer "and Nellie A. Sawyer, thereunder be, and they are determined and "have ceased." Paper Book, p. 57.

Now all this is not merely casual. It is in necessary sequence to respondent's primal position—viz: that he is entitled to foreclose the formal mortgages. The equitable mortgage is definite security for the $20,400 specified therein, and for no other sum. The formal mortgages secure wholly different amounts. It is not here a question of liens, primarily, but of the amount secured. The liens are only incident to the debts secured. In choosing to claim under the formal mortgage he perforce disclaims claiming under the
69 equitable,—hence he alleges, and obtains judgment, that the agreement and all rights thereunder, have ceased and determined. He squarely plants himself upon the propositions that, (1) the formal mortgages are in full force; (2) that the equitable mortgage is of no force. If defeated in his attempt to secure the relief demand-, then in order to claim the other, he must reverse his position, and assert that the "dead" mortgage is in full force and effect, and that the others are extinguished. Had he attempted such a shift in pleading it would have been a departure.

Jones *vs.* City of St. Paul, (Minn.) 75 N. W. 5.

II.

The fact that the equitable mortgage was not made a personal claim against appellants in no manner changes its character as a mortgage.

Fisk *vs.* Stewart, 24 Minn., 97.

In their brief, (p. 11 fo. 20) counsel say this mortgage is uninforcible, save possibly for the interest,—that the only possible foreclosure of it is by way of a foreclosure of the formal mortgages. The consistency of this with their demand, here first made, for a foreclosure of the equitable mortgage simply, is not easily discoverable. But the point of interest is that no *raison d'etre* is suggested for the assumption that the later mortgage can only, or can at all, be foreclosed for a sum other than that secured by it. Nor for the analogous position that such mortgage does not at all secure the amount specified in it, but is merely collateral security for such wholly different amounts. Here again it is not primarily a question as to liens, but as to amounts. We are also left in darkness as to the *modus operandi* by which the monthly payments of interest (6 per cent. per
70 annum upon the principal sum, $20,400) are to be considered to be not at all payments of interest upon that sum but as, *ex gratia* only, payments *pro tanto* upon the interest upon the formal mortgages. It must follow that any payments upon the principal sum ($20,400), if made, could only be applied as payments in like manner upon the former mortgages. Is it possible that counsel have developed from their idea that the equitable mortgage was forfeited, the conception that appellants never had any rights thereunder unless it be to pay the sums specified, together with enough more to satisfy the old mortgages with all interest at the old rates?

III.

Counsel also now argue from their assumption that their client made a bad bargain, that he should not be presumed to have intended the necessary results of his contract—but rather, in deference to such assumption, the provision of the contract fixing the $20,400 as the total debt should be construed to mean something else. But they also say, that their client intended, and supposed the contract to effectuate that intent, that upon any default in paying the monthly interest, all appellant's rights in the land instantly terminated, and that he became *ipso facto*; the owner and entitled to instant possession of all the lands. But they fail to indicate any possible interest to him, under such understanding, to retain the lien of the old mortgages, nor any legal claim to the amount thereof—unless indeed, as logically follows from the position of counsel, he intended and supposed he retained such right of ownership and possession, and also the personal demands against appellants of the tens of thousands of dollars called for by such securities in addition.

71 It need not be forgotten that, while counsel in their complaint, allege the total value of this land to be less than the amount due by the terms of the contract, they yet refused judgment

for that sum, and now insist upon the payment of upwards of $27,000 in redemption.

IV.

The attempt of counsel in their brief to assert any absence of good faith in one of the appellants, either in procuring the contract, or otherwise, being as devoid of foundation in the record as it is in defiance of the facts, would appear to be but another exhibition of facility in invention. The case shows affirmatively, that in entire satisfaction with the contract as it is, respondent, through his present leading attorneys, brought suit in ejectment upon it—then without suggestion of mistake or variance from his intention in any portion of the transaction, brought the present action.

V.

The seeming antipathy between counsel and the facts is again illustrated in their charge that appellants have changed front on this appeal.

In their answer, at the trial, and in their motion for amended findings their position was unmistakable, viz.: That the total debt was the agreed $20,400, and that the old mortgages were superceded by the equitable mortgage. Such is still their contention. In explanation of the fact that the mortgages were not satisfied of record, the further fact that they might prove of value as against adverse claims or mechanics' liens was stated in my former brief to this court. Also, as showing the logical sequence of respondent's claims, the fact that respondent held in his hands the difference between the agreed sum due on the old mortgages and the
72 $20,400 during the time intervening the making of the equitable mortgage and the assignment to him of the Willis mortgage, some five months. That this money either was the money of respondent or of appellants. If the latter, then *ex necessitate* respondent held it as trustee for appellants, to be used in buying in the outstanding mortgage. But under neither the complaint nor the evidence could plaintiff recover upon this ground. If the former, then it must be so by reason of his agreement to buy in that mortgage. Even if, upon buying that in, it was the understanding that it should be considered to be held as collateral to the equitable mortgage, then of necessity the latter was the principal, and the other mortgages collateral security only for the amount secured by that. The only answer to this argument is the assertion of a change of position, aided by that of their new and "surprising claim" of a new loan of the $20,400.

VI.

As to the three evidences of an intention that respondent should retain the former mortgage liens specified in his brief (p. 7 fo. 19) these considerations should not be overlooked.

(1.) The contract reads, (fo. 24), "In consideration that said "second party has taken and herewith does pay and take assignment to himself, etc.," of the outstanding mortgages. That is, as between the parties to this agreement, the mortgages are "paid."

(2.) Asserted "recognition of the mortgages as subsisting liens, in the deed." The only reference is the following: "That the same "are free from all incumbrances except those now of record thereon." This is no recoguition that such liens are existent or of force.

O'Brien *vs.* Findenan, 48 Minn., 213.

73 (3.) That plaintiff continued to hold them. Being kept unsatisfied as a protection against possible adverse claims, as matter of course he would hold them.

VII.

The drowning of a lien in a title in fee, is but one meaning of the word "merger." Appellants never suggested this sort of merger in this case. It as well signifies the extinguishment of a prior lien by the taking of a later one in substitution.

See, 15 Am. & Eng. Enc. Law, p. 331.

Yet many of respondent's cited authorities are cases only of the former class. In most of those remaining the action was between a stranger to the contract or later security and the mortgages therein or to the point, only that the mere taking of a later security for the *same debt* does not merge the former lien.

VIII.

Noting the omission in my former brief of support to the 9th assignment of error, briefly this—The finding and order complained of will result in a sort of strict foreclosure of the equitable mortgage in so far only as it gives a lien upon the land not included in the other mortgages. This is error for—

(1.) It is contrary to the theory of the complaint and action as tried.

(2.) The court found, and the judgment declared the contract, the soul of that mortgage was without life.

(3.) Judgment of sale of all the other lands was ordered, and such sale was immediately made, and those lands were bid in by respondent for the full sum found due with all costs. It has long been settled that such sale satisfies and pays the mortgage debt.

74 There can be, therefore, no debt left in existence to be satisfied by such passing of title under the ordered strict foreclosure. Now this judgment contemplated and made possible this result—also a purchase by others than the respondent. Had the lands been bid in by others, such sale alone would have satisfied the entire debt, yet respondent would have become the owner of this extra land upon failure to redeem from such sale—hence would have been twice paid his demand, just as he now will be upon such failure. This error is found in the findings and order of the trial court, hence no motion to that court to correct it was necessary. Such motion, however, was made and denied. See fo's 152 and 162 to 164, P. B.

IX.

In their brief, (p. 8), counsel say that the agreement—"recognizes the continued existence of the old" mortgages. But it is to be

noted that the agreement fixes the "principal sum," (fo. 28, P. B.) thereby secured as $20,400 and no more. Also that the deed, then delivered in escrow, and to be delivered to appellants upon their payment of the $20,400, was the agreed satisfaction piece of the new mortgage, and at the same time would formally satisfy of record the old. Now by its terms, the payment of this new "principal sum" and the equitable mortgage securing it, were "In consideration of "certain indebtedness" held by respondent, "secured by mortgages "on the land, and in consideration that he has taken and herewith "does pay and take assignments" of the remaining mortgages and in consideration of the delivery in escrow of the deed of defeasance. Thus this "recognition" of the old securities is in immediate context with, or rather is a part of, the provision merging them in
75 the new. The parties "recognized" this fact, also the contradiction between the total amount due by the terms of the old, and the agreed principal of the new security. They also recognized the impossibility of so construeing the agreement as to make the new mortgage collateral to those then held by strangers to it.

X.

By the delivery in escrow of this deed it was put beyond the power of respondent to refuse formal satisfaction of all the mortgages upon the records, upon payment of the $20,400 with interest. Right here, however, should be noted the distinction between the effect of such payment upon the new, and upon the old securities. It is a condition precident to the actual satisfaction, only of the equitable mortgage. While the incidental, yet necessary, effect of the second delivery of the escrow deed is a formal record satisfaction of the old, this fact in nowise tends to disprove their merger in the new, security.

XI.

The fact that the new agreement and security were taken in lieu of the old liens, (and that it was not the understanding that payment of the new sums was to be considered as a satisfaction) is shown by the following, among other considerations:

(1.) A six per cent. annuity was created, terminable only at the option of appellants. The time is extended beyond the statutory life of the old liens.

(2.) The new agreement, in all its parts, is operative *in presenti*.

(3.) Everything was settled and concluded. Respondent
76 did not contract to satisfy the old liens on payment of the $20,400. The only satisfaction provided as to them is wholly incidental, and none whatever in case the annuity be paid throughout their life. Save getting in the liens outstanding, nothing remained to be done by respondent, and nothing but payment of the new sums, by appellants.

(4.) Once a mortgage, always a mortgage. The exclusive character of the new arrangement and security in: (*a*), amount, (*b*), rate, and (*c*), times of payment of interest, (*d*), maturity of principal, (*e*), consequences of default, (*f*), method of satisfaction, (*g*), absence of

personal liability, and (*h*), in the payment in advance for getting in the outstanding liens.

XII.

Counsel argue that it is inequitable to deprive respondent of his securities. Under their claim that he understood that he became the owner in fee upon any default, it is not apparent how he could lose any securities in taking such title. His mistake, if any, is purely of law, and he seeks no relief, but sues, taking the contract as it is. As to the justice of this claim:—He says, through counsel, that he understood he was either to get the $20,400 or the land. Yet he refused appellants' offer at the trial to give him precisely this relief, demanding either the land or some $27,000—more than $4,000 over what he says he understood he was to have. Whatever his understanding he well knew he must lose all his securities upon payment of the $20,400 with interest. Also, that if appellants defaulted, he still had a first lien under his equitable mortgage for that sum, upon all the lands in the old mortgages, with the new tract
77 in addition. Had he been content to receive his just dues, he would have sought foreclosure of his equitable mortgage only. His loss, consequent upon a reversal of the judgment, is but failure to sustain the recovery of the extra thousands of dollars, to which he shows no right, legal, equitable or moral. It is this, and not any loss of securities he strives to avoid. The results, consequent upon treating the old mortgages as still in life, being thus wholly inequitable, they must be held to have been extinguished.

See cases cited, p. 17 of main brief, and 15 Am. & Eng. Enc. Law, p. — note.

Respectfully submitted,

J. A. SAWYER,
Att'y for Appellants.

78 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

DANIEL S. PIPER, Respondent,
vs.
JOSEPH A. SAWYER ET AL., Appellants.
} Petition for Modification of Order or for Rehearing in Part.

The appellants respectively petition this court that it so modify its order as to omit its holding that no obstacle to a foreclosure of the equitable mortgage exists, and its direction to find the amount due thereon and enter judgment of foreclosure for such sum, or in lieu thereof, that a rehearing upon that point be directed herein.

It is respectfully submitted that the matters passed upon in this portion of the order have never been passed upon by the trial court, nor argued and submitted to this court.

It was argued that the complaint is not broad enough to warrant such relief in this action, and possibly also a claim that on appeal respondent could not so shift his position. I think there are other considerations to be passed upon before any order of foreclosure be

entered, which the record affirmatively shows have not been passed upon below, and hence not to be decided here.

Woodbridge *vs.* Sellwood, 67 Minn. N. W. R. 788.
Coombs *vs.* McDonald, 43 Neb. 652, 62 N. W. R. 41.
Maxwell *vs.* Graves, 59 Ia., 613, 13 N. W. R. 758.
Bartemyer *vs.* Iova, 18 Wall. 121–125.

Indeed plaintiff's express refusal, at the opening of the trial below, to accept such foreclosure and his insistence upon his claims under all the old mortgages prevented the raising of that question there. Yet defendants might, as they did, then offer him such relief without waiver of any rights upon his refusal.

79 Or, if it be that the court intended to pass upon such point, then that it was mistaken in its assumption that the complaint prayed alternatively, "that the contract itself be foreclosed, etc. to satisfy the amount due thereon." (Opinion 3rd page near top.) And also that it was not intended to present the matter now submitted, nor was this matter argued save as above.

The prayer for relief is, first, for a strict foreclosure of all the mortgages for the sum stated to be due upon the four formal mortgages, with the attorneys' fees therein stated and costs, second, as follows,—"Or in case the court shall deem it inequitable to adjudge a strict foreclosure thereof as above prayed for, then that said contract and all said mortgages be foreclosed to satisfy the amount so adjudged to be due thereon" (viz. the amount due on all the other mortgages with the several attorneys' fees) "together with costs of suit, stipulated attorneys' fees, etc." See Paper Book p. 13 to 37. No foreclosure of the contract alone nor of the equitable mortgage alone, nor any foreclosure for the amount due thereon is prayed for.

In order further to exhibit some of the matters appearing here to be relevant, the clerk of the trial court certifies herewith copies of the original complaint, findings and order, motion by plaintiff to amend both complaint and findings, proposed amended complaint, final findings and order and judgment in the former action between the same parties referred to in the answer and reply herein. Also of the sheriff's report of sale and order of confirmation thereof, with register of deeds certificate that the sheriff's certificate of sale was duly recorded; all being of proceedings in the present action. The above proceedings in the prior case show—(both the complaint and proposed amended complaint are personally verified by the plaintiff), that he averred himself to be the owner, under the deed, of all the lands and as such sued in ejectment for possession with damages for withholding. That on trial the court held no transfer of

80 title, but an equitable mortgage had been made. That thereupon plaintiff moved to amend his complaint to conform to such finding, and that the findings and order be so changed as shown in said certified copy, and for foreclosure of such mortgage. But the trial court ordered the action dismissed "without prejudice to plaintiff's right of action to foreclose his equitable mortgage," and plaintiff had judgment entered accordingly, without prejudice as above. The certificate of sale and order of confirmation show

that plaintiff immediately upon entry of judgment herein proceeded to sell the lands thereunder and had such sale made of record in the register's office. It is my view that under such circumstances, even if plaintiff did not by bringing action to foreclose the former mortgages, elect to rely upon them only and waive all claims under the equitable mortgage, he at least did so elect when he refused to accept that relief upon its being offered to him on the trial. That the two rights and remedies were antagonistic, or rather were alternative and not co-ordinate, and that upon defendant's offer of judgment in the action chosen, such action, under that offer was not a mere seeking of an impossible remedy since thereunder he might have obtained all the relief he was entitled to. That he could not refuse such relief, compel the court and the defendants to litigate the case to final issue on appeal, and then being defeated in his demands for the extra sums, turn around and re-elect to take that remedy he had expressly refused at the outset.

I.

He had full knowledge both as to the facts and the law. The court in the former action had held the transaction to be an equitable mortgage and entered judgment upon such holding. This was *res adjudicata.*

II.

The two positions were antagonistic. He could only recover on the mortgages sued upon the theory (expressly set up in
81 his complaint, followed throughout the trial and embodied in the judgment) that by the default the contract became null and void, leaving those mortgages in full force. While to recover on the equitable mortgage either in this or in any other action he must stand upon the ground that the mortgages sued on were void, and that only in force.

7 Enc. Pl. & Pr. p. 362–363 and note 1 p. 363.
Thompson *v.* Howard, 31 Mich. 311.

In the latter case it is said—"It is well settled that a man may not take contradictory positions, and where he has a right to choose one or two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one with knowledge of such facts as would authorize a resort to each will preclude him from thereafter going back and electing again." This is often cited and followed in later cases. See Black *v.* Miller, 42 N. W. R. 838, bot., 839 top.

In 2 Black Judgments, sec. 632, it is said that "The rule forbids a party to assume successive positions, in the course of a suit or series of suits, in reference to the same facts or series of facts, which are inconsistent—or mutually contradictory."

Inconsistency in the underlying positions is everywhere recognized as the test.

III.

This is not a case of seeking for an impossible remedy—for at least two reasons.

First. At least when the offer of judgment was made and upon that offer plaintiff again elected not to accept it, such offer itself made the remedy chosen at the outset issuable in full relief to him. It matters not that by his then act he failed to recover any relief.

Field *v.* Burton, 49 Mich. 53, 12 N. W. R. 906.
Thomas *v.* Watt. Mich. 62 N. W. 345.
Cooper *v.* Smith, Mich. 67 N. W. 516.

82 In Thomas *v.* Watt *supra* the former action was dismissed for failure to file security for costs, and in the Cooper case plaintiff voluntarily dismissed it. No relief was obtained in either case—yet held an election. To the same precise effect are many of the cases hereinafter cited.

In the Nield case the first suit was in a court not having jurisdiction. Yet the election was held final, and this case has been often followed in that and other courts. The reason for this holding is that the election was made, and the fail——

Second. With full knowledge of all the facts and also of the law lying at the foundation of his rights, that having been before adjudicated, by his election to press his claims as he did, he elected his course and must abide the result.

In Sullivan *v.* Ross's Estate, Mich. 71 N. W. R. the plaintiff had had two trials below, in the second of which he knew all the facts yet insisted upon his course and secured judgment there which was reversed on appeal—the supreme court holding that there was not the slightest foundation for such claim and judgment. The action was upon a contract which plaintiff asserted constituted an agreement of sale of certain logs to defendant Ross. Upon the remand plaintiff moved the trial court to amend his complaint to show that Ross, under that contract became a quasi trustee of the logs and in the execution of such trust did not use due care and had thereby lost a portion of the logs etc. whereby plaintiff suffered damage. He claimed on appeal from an order denying such motion that his former quest was a mere seeking after a mistaken and impossible remedy. The order was affirmed. The court says—p. 635—

"With full knowledge of all the facts, he deliberately chose his remedy, and put the estate to a large expense in his attempt to sustain his claim. It is not a case of a mistake in the remedy, but a deliberate choice in remedies. The law does not permit
83 litigants thus to play fast and loose—but leaves them to lie upon beds of their own making."

In National Bank of Ill. *v.* Bank of Emporia, 51 Kan., 111—45 P. R. 79, the firm of L. & G. which owed both banks, made a chattel mortgage to L. as trustee to secure both debts, the amount of each being therein stated. The Ill. bank brought suit upon their claim and attached the property so mortgaged—other creditors having done the same. The property was sold and the proceeds applied on the several attachment judgments. Meantime the Emporia bank

brought suit to foreclose the mortgage. The trial court held the mortgage void and gave judgment to the Ill. bank. On appeal this was reversed and the mortgage sustained. On remand the Ill. bank moved the trial court to hold the mortgage a trust for both banks, and that the proceeds be applied *pro rata*, to both, therein accepting the same with all its provisions and paying into court the excess of moneys received over its *pro rata* share, etc. This motion was denied and all the defendants ordered to repay all moneys received into court for the benefit of the Emporia bank. On appeal this order was affirmed. After quoting from Thompson *v.* Howard 31 Mich. *supra* the court says:—

"In this case the Ill. bank had the option of accepting the security of the mortgage or rejecting it. In the latter case it might bring suit and attachment against the mortgage as fraudulent and void as to creditors. It chose that course, and—has litigated against the Emporia bank to defeat the claim of the latter under the mortgage and to obtain the entire proceeds. The mortgage was not only repudiated but made the basis for the attachment. The remedies were therefore inconsistent, and the plaintiff having taken and so long pursued its remedy by attachment must be content with the result." Again—

"The plaintiff in error claims that a party who imagines
84 he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries the wrong one, and cases are cited in support of that proposition. But we think it has no application to a case like this." Citing *Re* Van Norman 41 Minn. 494, the court thinks this case distinguishable. To the same effect here as the above Kansas case is Lienkauff *v.* Forcheimer, (Ala.) 6 Southern R. 149. Also in principle Dyckman *v.* Sevatson, 39 Minn. 132 and the many other cases to the same effect some of which are later referred to herein, support the above cases.

The distinction between an election of mere remedies and one between alternative rights with their respective remedies has often been made and I think that distinction applied here reconciles most if not all the cases. It is that where a party possess a single right, and mistakes his remedy upon such right, he does not waive the right, by such mistake. But where out of certain facts known to the party, other rights may arise, calling for inconsistent remedies, and the party elects to claim one of those rights (and follows such election to final judgment) he thereby elects his position and waives the other remedies upon the right which he thus declined to claim.

(While there is a divergence in the cases as to whether or not such mere election binds the party, or whether he may, before trial, dismiss and assert such alternative right, I find all the cases in harmony to the point that where he pursued such chosen right to final judgment—and it matters not whether such judgment be in support or denial of such right—this constitutes an election and a waiver of the other alternative rights. See Jones *v.* Burgess (Ala.) 19 So. R. 851–856 and Bolton Mines Co. *v.* Stock 82 Md. 50–59 At. R. 491.)

The many cases holding that where one has a lien under a mortgage or other instrument, yet sues the owner either upon the debt so

secured or another debt and levies upon the property mort-
85 gaged, thereby waives his mortgage lien, lend support to the position here taken.

"One entitled to a benefit under an instrument, whether it be a will or any contract, if he claims the benefit of such instrument must abandon every right the assertion whereof would defeat even partially the provisions of the instrument. A party cannot occupy inconsistent positions, but will be confined to his election." Hermann Estoppel (Md. 1886) p. 1177. Cited and approved in many of the following cases.

In Bauman *v.* Jaffray, (Tex.) 26 S. W. R. 200–202, goods were conveyed to a trustee to secure certain creditors. One of such creditors having levied an attachment on the same goods he was held to have waived the security under such conveyance. After citing the above from Hermann the court says, p. 262–263: "Had the attachment proceeding been prosecuted to a successful termination, it would have defeated the intention of the mortgagor as expressed in the instrument, to the extent of the property taken under attachment. * * * The bank elected to reject the mortgage when it sued out and levied the attachment, and it could not relieve itself from the effect of such election by its subsequent abandonment of the attachment proceedings and offer to accept under the mortgage." Citing many cases.

In O'Brien *v.* Glenn, 91 Tenn. 106–17 S. W. R. 1030 a stock of goods was assigned to a creditor to secure his and other debts. The assignee attached the goods under claim that the assignment was void. He afterwards dismissed this suit and proceeded to act under the assignment. Held, that by such attachment he renounced the benefit of the assignment and could not thereafter claim under it.

After citing the above from Hermann, reverting to the claim by the assignee that since the attachment was filed under the mistaken view of the law by his attorney, (which was the fact) the court says, 17 S. W. R. p. 1031:

"This can make no difference. The Leas were acquainted
86 with all the facts in the case, and that they were wrongfully advised cannot, of itself, destroy or render nugatory their renunciation of the benefit under the assignment."

In Lawrence *v.* McKenzie (Ia.) 55 N. W. R. 507, one defendant had assigned certain book accounts to the plaintiff as security, but by understanding retained the book to collect for plaintiff such accounts. Later plaintiff sued out garnishment against the parties owing such accounts. Held he thereby waived his claim under the assignment. So to-, by analogy. Where the plaintiff attached certain property in an action to recover its purchase price, and the defendant claimed it as exempt, it was held that by the attachment the plaintiff waived his claim of title under the contract of sale which provided that he held the title until the purchase price was paid. Kolsky *v.* Loveman (Ala.) 12 So. R. 720.

So in Ward *v.* Green, (sup. ct. Tex.) 30 S. W. R. a purchaser of lands assumed in his deed a portion of a mortgage debt on the land—and the mortgagee thereafter brought suit against the mortgagors

and him to foreclose the mortgage, but did not therein seek any personal recovery as against the purchaser. Upon sale, there was a deficiency, and judgment therefor was entered against the mortgagors. This was invalid for want of personal service, they being non-residents. Thereafter suit against the purchaser to recover the portion assumed by him. Held not maintainable. The plaintiff had elected to waive this right, in bringing the former action. The court says, p. 866 30 S. W. R.

"Where a party who has a choice of remedies upon a cause of action pursues one of them to final judgment, he thereby makes an election by which he must be held to be estopped, and he cannot have successive suits against the same parties in order to determine whether or not he might recover upon a phase of the case not presented in the first action."

IV.

87 Not only is there here shown an election and waiver, but there seems ground for an estoppel. Knowing all the facts as well as the law, the plaintiff refused to accept the offer of full and complete relief and insisted upon carrying his contention to recover some thousands of dollars more than he had any shadow of claim for to judgment, and a sale of the lands therefor, putting on record his apparently valid certificate of sale, and requiring of the defendants the procuring of a bond in appeal, the appeal itself, and the removal of record of his false certificate of conveyance—he cannot now retrace his steps and demand the relief he has refused to accept.

Mosher *v.* Joyce, 51 Fed. R. 441, (before Brown justice and Jackson and Tafft C. C. J.) Action to recover for infringement of patent. Plaintiff's patent covered part only of the improvements contained in the articles made. He went to trial on a claim that the entire value of the profits on such articles arose from his invention and recovered in the trial court upon such claim. On appeal, it was held that his invention operated only partially in securing such profits, and that he should have known what part thereof so arose. On remand, he sought to amend and show such amount. Denied, and on appeal this was affirmed. "Held that it was a proper exercise of discretion to refuse the motion, as complainant, with full notice of defendant's claims, had chosen to rely entirely upon his own theory of the case."

In Black *v.* Miller (Mich.) 42 N. W. at p. 839 that court says—

"He made his choice of remedies, and while it is true that one may not be entirely inconsistent with the other, yet the policy of the law is to estop parties from pursuing some other mode of redress, after having elected their remedy that there may be an end of litigation."

I think it proper for me to state, in presenting this motion, that I greatly prefer not to present or press this matter. But since the portion of the order here objected to will in all probability prevent

88 any just settlement of the matter between the parties unless at very great sacrifice, and since I feel confident that if that be stricken out and the matter left for future consideration

such settlement will be readily made, whereby each party will receive his moral dues and there will remain no occasion for any further consideration by the court, I have decided to present the matter.

All of which is respectfully submitted

J. A. SAWYER.

89 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

DANIEL S. PIPER, Respondent,
vs.
JOSEPH A. SAWYER and NELLIE A. Sawyer, Appellants. } No. 191. Copy of Order.

It is ordered that the within application for a rehearing be and the same is hereby denied and the stay of proceedings entered herein vacated.

Dated July 27, 1898.

CHARLES M. START,
Chief Justice.

90 [Endorsed:] State of Minnesota, supreme court.

91 STATE OF MINNESOTA, } *ss:*
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
vs.
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

Case as Settled by the Court Supplementary to the Former Settled Case.

After the decision of the supreme court on the appeal heretofore taken in this action and after the mandate remitting it to this court had been duly filed therein, the following proceedings were had in this court:

Notice and Motion for Leave to Serve and File a Supplementary Answer.

Made and served Nov. 18th, 1898.

92 Venue and title as above.

Please take notice—that the above-named defendants will present to said court at the court-house in the city of Faribault, Minnesota, at 9.30 a. m., on the 28th day of November, 1898, or as soon thereafter as counsel can be heard, the following motion for leave to serve and file a supplementary answer in said cause, a copy of which said motion and of said proposed supplementary answer is herewith

served upon you. Said motion is based upon the following grounds, viz:

The defense therein set forth is one originating since the former trial of this cause in this court, and dates in its fullness only from the entry of the judgment in said cause on appeal in the supreme court of Minnesota, and could not have been pleaded nor set forth save only at a time subsequent to the entry of said judgment on appeal, and subsequent to the remand of said cause to this court. Said motion will be made upon the files and papers therein named and also upon the original objections and proposed supplementary answer served upon you at the hearing of your motion for amended findings herein, and also upon the judgment on appeal in said cause.

Dated at Owatonna, Minnesota, this 18th day of November, A. D., 1898.

J. A. SAWYER,
Att'y for said Defendants.

To Daniel S. Piper, said plaintiff, and to Messrs. Wheelock & Sperry and Robert Taylor, Esq., his attorneys.

Motion.

Venue and title as above.

Defendants Joseph A. Sawyer and Nellie A. Sawyer above
93 named, hereby move the court for leave to serve and file their supplementary answer in said cause, a copy whereof is hereto attached. Said motion is based upon the pleadings and all the files in said cause and upon the judgment of the supreme court on appeal herein and upon the affidavit hereto attached and upon the court reporter transcript of the proceedings had at the former trial hereof in this court and upon the offer made by Joseph A. Sawyer as attorney for said defendants therein stated, and upon the refusal by plaintiff to accept said offer.

JOSEPH A. SAWYER,
Defendants' Attorney.

Affidavit Referred to in Above Motion.

Venue and title as above.

STATE OF MINNESOTA, } ss:
County of Steele, }

Joseph A. Sawyer being duly sworn, says that he is the attorney of the answering defendants herein and has been their sole attorney from the commencement of this action. That after the remand of this case from the supreme court of the State of Minnesota was filed herein, and the judgment of the supreme court was filed herein, said plaintiff, on or about the 1st day of September, 1898, served a notice upon this affiant of a motion herein for amended findings of fact and new findings of law, to be made by

the court herein on such motion; said motion to be heard, argued and submitted at the court-house in the village of Mantorville, Dodge county, Minnesota, on the 3rd day of October, 1898, at eleven o'clock of said day. This affiant was on said 3rd day of October; and for a long time prior thereto, confined to his
94 bed by sickness, and unable to attend to said motion at said time. Whereupon this court continued said motion to October 8th, 1898, at which this affiant as such attorney served upon the attorneys for the plaintiff a supplementary answer and affidavit and objections to the hearing of such motion and objections to the granting thereof, said objections specifically set forth the claims under the provisions of the United States Constitution as set forth in the proposed supplementary answer hereto annexed. That said hearing was thereupon by this court continued to October 14th, 1898, at Owatonna, Minnesota, at which time said plaintiff withdrew his said motion and all thereof and returned to affiant said supplementary answer and said objections. No proceedings of any kind in said cause have been had or taken since the decision thereof on appeal, other than as above stated. This affiant, by reason of ill health, has for many months and from a time prior to the decision by the supreme court of said cause on appeal, been unable to be in his office and unable to perform legal work save a little at a time and at intervals, and has been for quite a portion of the time confined to his bed, and a large portion of the time to his room; and since the withdrawal of said motion by plaintiff on said 14th day of October, 1898, affiant has remained ill and indisposed and unable to be in his office from sickness, and unable to perform professional labors, except only at intervals, and at such intervals only for a short time. He has on three separate occasions, since the 14th day of October, 1898, sought to draw and complete a supplementary answer, and motion for filing thereof, with the affidavits in support of such motion, and on each of said occasions has been, by reason of ill health and sick-
95 ness, compelled to desist therefrom, and unable to perform and complete said labor. No notice of trial or other notice of any proceedings in said cause has been served upon affiant nor upon either of said defendants, save as hereinbefore expressly stated. And affiant further says that by reason of sickness, he has been unable heretofore to complete said supplementary answer, motion and affidavits, or any of them. This affidavit is made for use in support of defendants' motion for leave to serve and file their supplementary answer herein.

At the commencement of the former trial of this cause in this court, and when the same came on for trial, in open court and before any of the proceedings relating to said trial had been taken or completed, this affiant offered in open court that the plaintiff take judgment herein foreclosing the lien of his equitable mortgage arising by virtue of the contract set forth in the complaint herein and of the deed from said defendants to this plaintiff of all said premises. Thereupon this plaintiff refused to accept said offer and refused to take said judgment or any judgment, other than one fore-

closing each of the former mortgages set forth in his complaint herein; that thereafter, and before the submission of the cause to this court for decision this affiant withdrew said offer.

Each of said defendants is a citizen of the United States.

Affiant further says that he has knowledge of all the facts touching the matter set forth in the supplementary answer herein and touching all issues therein sought to be raised; that upon said facts and upon the laws relative thereto affiant verily believes that
96 he has a good and sufficient defense in said action to the attempted foreclosure by plaintiff of his said equitable mortgage, and that he has a good and sufficient defense to all demands and claims in said action on the part of the plaintiff.

JOSEPH A. SAWYER.

Subscribed and sworn to before me this 15th day of November, 1898.

[NOTARIAL SEAL.] GEO. A. NEWSALT,
Notary Public, Steele County, Minnesota.

Proposed Supplementary Answer.

Venue and title as above.

I.

That at the beginning of the former trial of this action in this court, and immediately after the same was brought on before the court for trial, and before any proceedings had been had at such trial other than as above, said defendants in open court, offered to this plaintiff that he might take, without contest, a judgment and decree foreclosing the lien of his equitable mortgage herein and for the amount due and unpaid on such equitable mortgage; that said offer was then, and in open court declined, by the plaintiff, and such relief refused by him. That thereafter, and before said cause was submitted to this court for decision, said defendants withdraw said offer.

II.

That the former action set forth in the original answer and reply herein, and wherein this plaintiff was plaintiff and these defendants were defendants, was an action in ejectment, in which the plaintiff alleged himself to be the owner of all the lands described in the complaint herein, and entitled to the immediate possession of all thereof, and in which he demanded, as relief, that the de-
97 fendants surrender possession to him, and that he have certain moneys as damage for the withholding of possession thereof; that at the trial of said action in this court, it was by this court adjudged and decreed that said contract and decree set forth in the complaint herein, and which were both set forth in the complaint in said former action, constituted an equitable mortgage in favor of the plaintiff, securing to him the payment of the twenty thousand four hundred dollars with interest; and thereafter it was

further ordered and decreed by this court that said action of ejectment be dismissed. Thereafter, without notice to the defendants or either of them, the plaintiff caused a judgment of dismissal to be entered in this court. These defendants aver that they had no notice or knowledge of the entry of said judgment until the time of the service of the reply herein.

III.

Further answering, the defendants allege that this plaintiff has waived the lien of said equitable mortgage and precluded himself from attempting to enforce said lien and from seeking any foreclosure thereof.

IV.

Said defendants allege, and hereby claim the protection guaranteed to all citizens of the United States by the provisions of section ten of article one of the Constitution of the United States, and of section one of the fourteenth amendment to the Constitution of the United States; and further claim that any judgment herein in plaintiff's favor, foreclosing said lien for any sum whatever would abridge the privileges and immunities of these defendants who are citizens of the United States, and would deprive them of property
98 without due process of law, and would deny to them the equal protection of the laws.

Wherefore they pray that this action be dismissed on the merits and with costs.

J. A. SAWYER,
Defendants' Attorney.

Duly verified Nov. 15th, 1898.

Upon the hearing of defendants' said motion for leave to serve supplemental answer the plaintiff filed the following affidavit:

Venue and title as above.

STATE OF MINNESOTA, } ss:
County of Steele, }

W. A. Sperry and Robert Taylor being duly sworn on oath say they are attorneys for plaintiff in the above-entitled action; that they have read the affidavit of Joseph A. Sawyer of the 15th day of November A. D. 1898. That the statement in said affidavit that a supplemental answer was served upon plaintiff's attorneys is untrue; that notice of a motion for an amendment to the findings of the court in accordance with the decision of the supreme court, was served upon defendants' attorney, returnable on the 3rd day of October, 1898, at the village of Mantorville in Dodge county, said State, which was by consent of the parties continued until the 8th day of October, 1898, and was again continued to be heard at the clerk's office in the city of Owatonna, in said Steele county on the 14th day of October, 1898; that the defendants' attorney did submit to plaintiff's attorneys for inspection only, in the presence of the

judge of this court, a proposed supplementary answer but the same was not served upon plaintiff's attorneys or either of them, nor any such service accepted by plaintiff's attorneys or
99 either of them; that defendants' attorney did object to the hearing of said motion upon the notice then given on certain grounds of irregularity among other things, whereupon, by suggestion of this court said motion was withdrawn with the distinct understanding before the court that it might be again renewed to be heard at the approaching term of this court in Steele county, and all the papers of the defendants' attorney therein were thereupon returned to him. Affiant further says that the matters of fact which are set up in the proposed supplementary answer now offered by defendants' attorney are set forth and fully appear in the settled case hereby on file in this court to which reference is hereby made, and constitute a part of the return to the supreme court upon the appeal heretofore taken here; and were by said supreme court fully considered and determined. And they deny that defendants did ever withdraw the offer of judgment made on the trial as alleged in defendants' affidavit and proposed supplementary answer, or otherwise.

ROBERT TAYLOR.
W. A. SPERRY.

Subscribed and sworn to before me this 23rd day of November, 1898.

LEWIS L. WHEELOCK,
Notary Public, Minn.

No other affidavits or files were submitted to the court or considered by — in deciding said motion save as herein included.

Thereupon the court made the following order denying defendants' said motion

Venue and title as above.

This action came before the court at the court-house in the
100 city of Faribault in Rice county in said district and State on the 20th day of November, 1898, at 1.30 p. m. upon the application of the defendants Joseph A. Sawyer and Nellie A. Sawyer for an order herein permitting them to file a supplementary answer proposed and attached to the moving affidavit. Harlan E. Leach, Esq., appearing on behalf of said defendants in support of said motion and Messrs. Wheelock & Sperry and Robert Taylor, Esq., appearing for plaintiff and filing affidavit in opposition thereto, and upon hearing and considering said matter and the arguments of counsel therein: It is herein ordered, that said application of said defendants be, and it is hereby denied.

Dated at Faribault, Minnesota, Nov. 28th, 1898.

THOMAS S. BUCKHAM,
District Judge.

To which said order, denying defendants' said motion, for leave to file said supplementary objection, defendants then and there

prayed and were allowed an exception, and did then and there duly except.

Plaintiff's Notice of Motion for Amended Findings and Order.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

SIRS: Please take notice, that upon the mandate and remittitur, judgment, and decision of the supreme court, of said State in this action transcripts of which are on file herein in the office of
101 the clerk of this court, and copies of which are attached to the annexed affidavit of W. A. Sperry, and upon said affidavit, copies of each and all of which are herewith served upon you and upon all the pleadings, records and files herein, said plaintiff will make application to said court at the general term thereof to be held in and for said Steele county at the court-house in the city of Owatonna, in said county, on Tuesday the 6th day of December A. D., 1898, at the opening of said court on that day or as soon thereafter as counsel can be heard, to have the findings and decision of this court herein amended and modified in accordance with the said judgment and decision of said supreme court, and upon the grounds set forth in said judgment and decision of said supreme court and that said action will then and there be brought on for hearing, trial determination in accordance with the said decision direction and judgment of said supreme court herein a draft of such amendment and modification of the findings and decision of this court herein proposed by plaintiff and so to be applied for is hereto attached and herewith served upon you.

Dated this 22nd day of November, A. D., 1898.

WHEELOCK & SPERRY AND
ROBERT TAYLOR,
Attorneys for said Plaintiff.

To the above-named defendants, and to Joseph A. Sawyer, Esq., defendants' att'y.

Affidavit of W. A. Sperry, Attached to said Notice of Motion.

Venue and title as above.

102 STATE OF MINNESOTA, } ss:
County of Steele, }

W. A. Sperry being duly sworn says he is one of the attorneys for the plaintiff in the above-entitled action and says that the appeal to

the supreme court of said State from the judgment of this court heretofore entered herein has been duly determined and judgment therein, has been duly entered in and by said supreme court, and said cause has been duly remanded to this court and a transcript of the opinion, decision and judgment of said supreme court therein has been duly filed in the office of the clerk of this court, true copies of all of which are hereto attached and are hereby referred to and made a part of this affidavit and are served herewith.

W. A. SPERRY.

Subscribed and sworn to, etc.

Judgment in the Supreme Court.

Pursuant to an order of court duly made and entered in this cause on the 15th day of August, A. D. 1898. It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the fifth judicial district, sitting within and for the county of Steele, be, and the same hereby is in all things reversed, together with all subsequent proceedings in the direction of its enforcement, if any there be, and the court below directed to proceed in accordance with the views expressed in the opinion a copy of which opinion is attached to and made a part of the remittitur. And it is further determined and adjudged that the appellants above named to have and recover of said Daniel S. Piper, respondent, herein, the sum and amount
103 of one hundred twenty-six and ninety one-hundred- dollars, ($126.90) costs and disbursements in this cause in this court, and that said appellants have execution for the enforcement thereof.

Dated and signed this 15th day of August, 1898.

D. F. REESE, *Clerk.*

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office, that I have carefully compared the within copy with said original and that the same is a true transcript therefrom.

[SEAL.]

Witness my hand and the seal of the supreme court at the capitol in the city of St. Paul, this fifteenth day of August, A. D. 1898.

D. F. REESE, *Clerk.*

Mandate.

STATE OF MINNESOTA, *Supreme Court,* } ss:

The State of Minnesota to the hon. judge and officers of the district court of the fifth judicial district, sitting within and for the county of Steele, Greeting:

Whereas, lately at your court, in an action therein pending, wherein Daniel S. Piper was plaintiff and Joseph A. Sawyer, Nellie A. Sawyer and L. C. Woodman, defendants, a certain judgment was entered therein on August 19th, 1897, from which judgment said defendants, Joseph A. Sawyer and Nellie A. Sawyer appealed to this court.

104 And whereas, the same was duly argued, heard and submitted at the general April term A. D. 1898, at our supreme court. After mature deliberation thereupon had our supreme court did adjudge, determine, decree and order "That the judgment of the court below herein appealed from, be, and the same herein is, in all things, set aside, and reversed, etc., as set out in the transcript of judgment and copy of opinion of this court hereto annexed and made a part of this remittitur:"

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our supreme court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your court for such other or further proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness the Hon. Charles M. Start, chief justice of the supreme court aforesaid, and the seal of said court at St. Paul this fifteenth day of August, A. D. 1898.

D. F. REESE,
Clerk of the Supreme Court.

Syllabus.

1. A certain contract, entered into between plaintiff and defendants concerning certain real-estate mortgages upon lands owned by the latter, construed with reference to other facts and circumstances constituting a part of the same transaction. Held, that said contract, constituted an equitable mortgage upon the lands into which the prior mortgages had merged.
2. Held also, under the allegations of the complaint herein, and the findings of fact that plaintiff was entitled to a foreclosure of
105 the equitable mortgage in this action.

Opinion.

February 19th, 1895, defendants, husband and wife, were the owners in fee of a farm embracing 790 acres. Plaintiff held a mortgage upon all of this land, except ten acres upon which there was no incumbrance. There were three prior mortgages upon parts of this

farm, and two of these, both past due, has been assigned to the plaintiff by the mortgagees. The third, known as the Willis mortgage would not mature until July, 1895. On the day first mentioned, plaintiff of the first part and defendants of the second part and one Woodman of the third part, entered into a tripartite agreement, in which $20,400 was fixed as the total amount secured by the four mortgages before mentioned—although it seems to have been more—and it was agreed—first—that defendants should forthwith convey to plaintiff by deed, containing special warranty covenants, all of the lands encumbered and the ten acres unincumbered; that defendants should pay certain taxes on the lands; that they should keep the farm buildings insured for plaintiff's benefit and that, commencing on the last day of the month of February, they should, on the last day of each and every month thereafter and continuously, pay to plaintiff the sum of $100, no time being expressly fixed when said payments should cease. Second—Plaintiff was to procure an assignment of the Willis mortgage to himself, thus becoming the owner of all the mortgages; he was to execute a warranty deed in due form of law of all said lands, in which defendant's wife was to be named as grantee, and this deed was to be placed in the
106 hands of Mr. Woodman, to be held by him in escrow until defendants "shall have paid all said monthly payments" and also the sum of $20,400, the latter to be paid in sums of $50 at defendant's option. The contract further provided as follows, a part of which we italicise: "It being agreed and understood that said parties of the first part shall become entitled to the delivery to them or their assigns of said deed held by said party in escrow, as above at any time whatever, provided only that they continuously pay said $100 monthly and also pay said sum of $20,400 in time and manner as above and it is further provided that said monthly payments shall be diminished from and after any payment upon said $20,400 in the same proportion which the sum or sums paid thereon bear to said total sum of $20,400. *Provided further, that upon failure of said party of the first part to pay said monthly payments, all their rights hereunder shall cease and determine.*"

Defendants duly executed and delivered the deed to plaintiff and it was soon afterwards recorded. Plaintiff purchased and procured an assignment of the Willis mortgage, and also executed and placed a deed from himself to Mrs. Sawyer in Woodman's hands, as agreed on and the latter, in form, became a party to the contract. The defendants paid the monthly installments during the year 1895 and then defaulted. Nothing has been paid on the principal. The complaint in this action set up the execution, delivery and record of each of the mortgages, the assignment of the three, which in point of time preceded that in which plaintiff was mortgagee, and the recording of each assignment, the making of the contract
107 before referred to and the default of the defendants in its terms and conditions. Judgment was demanded to the effect that by reason of the default on defendants' part the original sums due upon the notes secured by the four mortgages be adjudged due, and a foreclosure of each mortgage be had for the respective sums due

with a sale of the mortgaged property to satisfy the debts. Or that the contract itself be foreclosed by sale of the premises therein described to satisfy the amount due thereon with attorneys' fees, costs and expenses. Further and other equitable relief was also demanded. At the opening of the trial of the issues made by the defendants' answer and plaintiff's reply, the former seem to have offered that judgment might be entered for a foreclosure of their rights in the contract, but the offer was declined and a trial had, the real contention being over the construction to be placed upon a part of the language of, the contract hereinbefore quoted. On findings of fact the court below ordered judgment for a foreclosure of each of the mortgages and all costs of the proceedings, the total amount for which judgment was ordered being several hundred dollars in excess of the amount due, if it be held that the four mortgages merged in the transaction of February 19, and that the contract of that date, became an equitable mortgage as between plaintiff and defendants, for the principal sum of $20,400, extinguishing the older mortgage securities then in plaintiff's hands and also that held by Willis when it got into his hands by assignment as agreed upon.

That it was competent for the parties to enter into a contract in the nature of an equitable mortgage which would be a substitute for, and would operate as an extinguishment of plaintiff's then existing rights under his past-due mortgages is not questioned, nor can it be doubted that he could enter into a valid contract of that same nature in reference to the acquisition and merger of the Willis mortgage. There was ample consideration for such a contract and when plaintiff stipulated that the amount for which he would release the lien should be $20,400—really less than the amount actually due—he either took the chances of that being sufficient to cover the amount due or for an ample consideration, found stated in the contract, relinquished the excess. The contract being valid and enforcible, the rights of the parties depend upon the construction to be placed on the words which we have italicised in the foregoing quotation and these are to be construed in the light of the surrounding circumstances, some of which are prominent and very influential. It is to be observed that, as a part of the transaction defendants conveyed to plaintiff all of the mortgaged premises and 10 acres of land on which there was no incumbrance, and that the defendants' right to pay $100 per month, which evidently was considered as payment of interest at a trifle less than six per cent. per annum, was unlimited as to time, that the option to pay this principal sum when defendants' choice was conferred upon them, should they otherwise comply with the terms of the contract and finally, that the only provision which expressly referred to a termination of defendants' rights was that which provided that in case of their failure to make the monthly payments "all their rights hereunder shall cease and determine."

The legal effect of these salient points in the contract, and of what was done in persuance of the same was to transfer the record title of the land to plaintiff, to give him additional security, to reduce the principal of the debt, a

part of which was not due, to $20,400, to indefinitely postpone and extend the time for the payment of the principal sum, if defendants made the monthly payments and to provide, not that the original indebtedness should remain and the original securities be enforced for the full amount due in case of a failure to pay $100 per month, but simply and solely that defendants' rights under the contract itself should end. In other words, that if they defaulted in their continuous payments of $100 their right to the postponement of the due day of the principal sum and to extend the time of its payment at their option and their other rights to pay the same in sums of not less than $50 each, ceased and determined. We are of the opinion that no other construction can be given to the language used when we consider the facts specially referred to and their legal effect. For instance, under the contract defendants could have postponed payment of the principal sums therein mentioned at their pleasure and could have prevented any action whatever therein until foreclosure of the mortgages became barred under the statute of limitations. But had this been done the indebtedness of $20,400, or any unpaid part of the same would have still remained unpaid and would have still been secured by an equitable mortgage on the land. This fact seems to conclusively establish the proposition that the contract has always been such a mortgage and in which the four prior encumbrances had merged. The court below was in error when it
110 held that those prior mortgages remained and were valid and subsisting liens on the lands therein described.

It is argued by defendants' counsel that in this action plaintiff is not entitled to a foreclosure of this equitable mortgage, the reason given being that he elected to institute this proceeding for a foreclosure of the original mortgages only, and expressly declined to accept the relief afforded by a foreclosure of that found in the contract. As before stated the complaint was broad enough to have justified findings upon which could have been predic-ted conclusions of law in accordance with the views herein expressed and ordering a foreclosure of the equitable mortgage for the sum due on the contract, with proper costs of the proceedings and the findings of fact actually made warrant such conclusions, except that the sum due was not ascertained. No good reason existed at the termination of the trial below, and none now exists why plaintiff should not be entitled to a foreclosure in this action of his equitable mortgage on the 790 acres. The judgment appealed from is reversed and set aside together with all subsequent proceedings in the direction of its enforcement if any there be. Upon the remanding of the cause to the court below it will proceed to determine the amount due upon the equitable mortgage, amend its findings of fact to correspond, and also amend its conclusions of law in accordance with the views herein expressed.

COLLINS, *J.*

On the first day of the regular December term of this court, to wit, on the 6th day of December, 1898, upon the hearing — plaintiff's said motion to have the findings of this court amended and modified

as directed by the decision and judgment of the supreme
111 court, before any other proceedings were had defendant read the affidavit of J. A. Sawyer, one of the defendants, and in connection therewith also offered in evidence that part of defendants' trial brief in the former action referred to in said affidavit, found on page six of said trial brief and included in said affidavit, together with the title of said case upon said brief, and the formal admission of service thereon of said brief by Wheelock & Sperry, attorneys for the plaintiff, which is hereto attached marked Exhibit 1.

To this the plaintiff objected on the ground that it was incompetent, irrelevant and immaterial and was inadmissable on the hearing of this motion. The court sustained the objection and defendants excepted to the ruling.

Thereupon defendants further offered in evidence the following papers, viz.: The complaint, answer, reply, findings and order for judgment, and judgment all of which were the pleadings, papers and records in the former action between the same parties and the same being parts of the judgment-rolls in said former case between the same parties, copies of which are hereto attached marked Exhibit 2, "Ex. 3," "Ex. 4," "Ex. 5," "Ex. 6," "Ex. 7" and "Ex. 8," and before making such offer of evidence, offered and asked leave to call as a witness George W. Peachey, clerk of this court, to prove by him that said complaint, answer, reply, findings and judgment were and are the complaint, answer, reply, findings and judgment in such former action, and constituted a part of the judgment-roll therein; thereupon the plaintiff's counsel objected to the calling of such witness and to the admission of said papers, and each thereof,
in evidence upon the same grounds last above specified,
112 which said objections, and each thereof, were sustained by the court; to which said orders and rulings of the court, and to each thereof, the said defendants then and there duly excepted.

Defendant- then offered in evidence the first notice of plaintiff to amend findings and also the objections thereto of defendants upon the same grounds, to which plaintiff objected, which objection was sustained by the court to each of said offers, and an exception to each of said rulings was duly taken by defendants.

Defendants then renewed their offer to file their supplementary answer in the above-entitled action, to which the plaintiff objected on the same grounds above specified and also on the grounds that the proposed supplementary answer did not set up facts constituting a defense and that the matters set forth in said proposed supplementary answer were *res adjudicata*, which said objection was sustained by the court, and exception duly taken by defendants.

Defendants then entered formal objection to the motion for an order amending findings and amending the judgment, both generally and specifically, upon the ground (*a*) that the court, by its order refusing to allow supplementary answer and in excluding the above evidence, has prevented defendants from all right to any trial and prevented them from introducing and proving their defense, which said objections were overruled by the court, and to

which said orders, and to each and all thereof, defendants duly excepted.

Affidavit of J. A. Sawyer, Referred to Above and Admitted and Filed.

Venue and title as above.

113 STATE OF MINNESOTA, } ss:
County of Steele, }

J. A. Sawyer, being duly sworn, says that he is one of the attorneys of the two answering defendants above named, and at all times he has been their attorney in said action, also in the former action between said parties referred to in the answer and reply herein. That upon the trial of said action in this court, prior to the appeal therein, the same being at the regular June, A. D. 1897, term of said court, after the evidence therein was taken it was agreed by and between the respective counsel and the court that the plaintiff's counsel should make and serve upon defendants' counsel (this affiant) their trial brief therein, and that thereafter affiant, as defendants' counsel, should make and serve upon plaintiff's counsel his trial brief in said cause and that thereafter said cause should be submitted to the court upon the evidence, arguments and said briefs. That thereafter plaintiff's counsel did serve upon affiant their trial brief, whereupon this affiant, acting as defendants' counsel as aforesaid, did serve upon plaintiff's counsel his trial brief, which said trial brief is hereto attached. That said cause was not submitted to the court for decision until after said briefs were so served. That in affiant's said trial brief and upon the sixth page thereof (both in said original brief, which was submitted to the court and in the copy thereof which was served upon plaintiff's counsel as aforesaid), is this matter:

"At the opening and before the trial began, defendants offered in
" open court that plaintiff might take, without contest, a decree for
" foreclosure of the equitable mortgage. This offer was
114 " expressly refused. It is now withdrawn. It was impliedly
" withdrawn upon its refusal."

Upon the back of said brief Messrs. Wheelock & Sperry, attorneys, then and now, of the plaintiff, admitted service on the 22d day of June, 1897, as appears thereon.

(Signed) J. A. SAWYER.

Subscribed and sworn to before me this 5th day of December, 1898.

HARLAN E. LEACH,
[NOTARIAL SEAL.] *Notary Public, Steele County, Minnesota.*

EXHIBIT 1.

"At the opening, and before the trial began, defendants offered in open court that plaintiff might take witnout contest a decree of foreclosure of the equitable mortgage. This offer was expressly re-

fused. It is now withdrawn. It was impliedly withdrawn upon its refusal."

Upon the back of said brief appeared the title and venue as above, followed by the following, (being that part so offered and admitted as above,) viz:

Personal service of the within brief is hereby admitted at Owatonna Minn. this 22nd day of June, 1897.

WHEELOCK & SPERRY,
Attorneys for Plaintiff.

EXHIBIT 2.

Complaint.

Venue and title as above.

The complaint of the plaintiff respectively represents and shows to the court—

I.

That heretofore, to wit, on the 19th day of February,
115 & 116 1895, this plaintiff became and still is the owner of the following-described premises, situate in the county of Steele and State of Minnesota, to wit: The south half of the southwest quarter, and the northeast quarter of the southwest quarter and west one-fourth of southeast quarter of section twenty-one (21), and northwest quarter and undivided one-half of west half of northwest quarter of southwest quarter of section twenty-eight (28), and northeast quarter and north half of southwest quarter, and undivided half of southwest quarter of southwest quarter of section twenty-nine (29), and north half of northeast quarter and north half of northwest quarter and southwest quarter of northwest quarter of section thirty-two (32), all in township 107 (107) north, of range twenty (20) west, and containing seven hundred and ninety (790) acres of land, more or less.

II.

That on said day this plaintiff entered into a contract with the defendants, Joseph A. Sawyer and Nellie A. Sawyer, wherein and whereby this plaintiff was to execute a deed to Joseph A. and Nellie A. Sawyer, or either of them, of the above-described premises and deposit the same in the hands of the defendant, L. C. Woodman, in escrow, to be delivered to the said defendants, Joseph A. and Nellie A. Sawyer, whenever they would fully comply with the terms and conditions of said contract. That a copy of said contract is hereto attached and made a part hereof, and marked "Exhibit A."

III.

That plaintiff did on said 19th day of February, 1895, make and execute a deed of said premises to said Nellie A. Sawyer and
117 deliver the same in escrow to said defendant, L. C. Woodman, a copy of which deed is hereto attached and marked

"Exhibit B," and that said plaintiff has in all things complied with his part of the terms and conditions of said contract.

IV.

That in and by the terms of said contract, said Joseph A. Sawyer and Nellie A. Sawyer were to pay this plaintiff the sum of one hundred dollars ($100) on or before the last day of February, A. D. 1895, and on or before the last day of each and every month thereafter continually, and on so doing and on the payment of the further sum of twenty thousand four hundred ($20,400) dollars the said defendants, Joseph A. and Nellie A. Sawyer, were to be entitled to the delivery to them of the said deed so deposited in escrow by this plaintiff with L. C. Woodman, and not otherwise.

V.

That in and by the terms of said contract and agreement it was contracted and agreed that upon the failure of the parties of the first part to pay said monthly payments all their rights under said contract should cease and determine, and that by reason of the failure of said Joseph A. and Nellie A. Sawyer to pay the amount due on or before the last day of January, 1896, all of their rights under said contract did cease and determine.

VI.

That in and by virtue of said contract these defendants, Joseph A. and Nellie A. Sawyer, went into possession of said premises and have continued in the possession and occupancy and use of
118 said premises ever since, which said premises consist of an improved farm in a high state of cultivation, with many valuable improvements thereon.

VII.

That said defendants, Joseph A. and Nellie A. Sawyer, have wholly neglected and failed to comply with the terms of said contract and have wholly failed to pay the sum of one hundred ($100) dollars per month, or any part thereof, during the months of January, February, March, April, May, June and July, 1896, and have wholly neglected and failed to pay any part or portion of the said sum of twenty thousand four hundred ($20,400) dollars and have wholly failed to pay any sum whatever except the amounts due for the year 1895.

VIII.

That said defendants, Joseph A. and Nellie A. Sawyer, have ever since the first day of January, A. D. 1896, wrongfully and unlawfully withheld from the possession of the plaintiff the premises above described, and that the value of the use and occupation of said premises during the time the same have been wrongfully and unlawfully withheld from the possession of the plaintiff is one hundred dollars ($100) per month.

IX.

That prior to the commencement of this action this plaintiff demanded and caused to be demanded of said defendants the possession of said premises, all of which have been refused.

X.

That prior to the commencement of this action plaintiff demanded of this defendant, L. C. Woodman, the delivery up to this
119 plaintiff of the deed of said premises so held in escrow by this defendant, L. C. Woodman, which demand was refused.

Wherefore plaintiff demands judgment against defendant, L. C. Woodman, for the delivery to this plaintiff of the deed so held in escrow by him and demands judgment against the defendants, Joseph A. Sawyer and Nellie A. Sawyer, for the possession of said lands and premises and that all rights of the defendants under said contract and deed be declared to have ceased and determined and for the sum of one hundred ($100) dollars per month since the first day of January, 1896, the value of the use and occupation of said premises and for such other and further relief as to the court may seem just and equitable and for his costs and disbursements herein.

WHEELOCK & SPERRY,
Attorneys for Plaintiff, Owatonna, Minn.

Duly verified July 29, 1896, by plaintiff in person.

Exhibit "A," referred to in said complaint, is the contract of February 19, 1895, and is found in full in the complaint in the present action, hereinbefore set out in full.

Exhibit "B," referred to in the above complaint in the deed executed by plaintiff to defendant, Nellie A. Sawyer, as one of the exhibits. Viz., Exhibit "G" offered in evidence at the former trial herein by the plaintiff and admitted.

EXHIBIT 3.

Answer in the Former Case.

Venue and title as above.

Answering the complaint herein the defendants, Joseph A. Sawyer and Nellie A. Sawyer allege:

120 I.

That on the 19th day of February, 1895, and for a long time theretofore these defendants were the owners and in possession of all the premises in the complaint described. That on that day these defendants were indebted to this plaintiff in certain sums of money, which together with other sums secured by certain liens on certain portions of said premises were then computed to amount to the sum of twenty thousand four hundred dollars. By agreement plaintiff took up and paid or had assigned to himself certain of these liens,

in consideration for his agreement to do — an agreement in writing was on said day entered into, of which said agreement Exhibit "A" in the complaint is a copy. In and by said agreement said defendant Joseph A. Sawyer agreed to repay to this plaintiff said sum of twenty thousand four hundred dollars as soon and as fast as he was able so to do, and until said payment should be made, to pay to plaintiff as interest the sum of one hundred dollars monthly, which said monthly payment was to be reduced proportionally to any and all payments made on said principal sum. At the same time and as part of the same agreement these defendants made, executed and delivered to this plaintiff a deed of warranty in terms conveying to plaintiff as grantee all the premises in the complaint described. As a further part and portion of said agreement plaintiff was to reconvey all said premises to this defendant Nellie A. Sawyer upon receiving payment of said sum—to which end the deed of which Exhibit "B" in the complaint, is a copy, was executed by plaintiff and delivered to the defendant L. C. Woodman, as a depository,
121 to be held by him until such payments should be made, when the same should be made, when the same should be by him delivered to these defendants. Subject to such agreement, these defendants are now, and ever since the same was made have been the owners of all said premises and in possession of the same.

II.

These defendants have fully complied with all the terms and conditions of said Exhibit A, save only that by reason of inability to collect certain sums due the defendant Joseph A. Sawyer in season so to do, they have as yet failed to pay the monthly installment of interest due for the month of January, 1896, and the months since. All which said monthly payments not now paid these defendants propose and offer to pay together with lawful interest on each thereof since the day when by the terms of said agreement the sum became severally payable.

III.

Defendants admit that the said premises constitute an improved farm, much of the same however being in timber and not productive as a farm save for the pasturage therein afforded. Save as herein alleged or admitted, these defendants deny each and every allegation and part thereof in the complaint contained. These defendants ask that upon payment of all sums in arrears by the terms of said agreement 7, together with interest to the time of such payments, that this action be dismissed.

Dated at Owatonna, Minnesota, August 22nd, 1896.

J. A. SAWYER,
Attorney for Defendants, Owatonna, Minnesota.

122 Duly verified.

Reply.

Venue and title as above.

EXHIBIT 4.

The plaintiff, for reply to the answer of the defendants Joseph A. Sawyer and Nellie A. Sawyer in the above-entitled action, denies each and every allegation of new matter in said answer contained.

Dated August 28th, 1896.

WHEELOCK & SPERRY,
Att'ys for Pl't'f.

Reply duly verified by plaintiff in person, before
W. A. SPERRY,
Notary Public.

EXHIBIT 5.

Original Findings and Order.

Venue and title as above.

This action, being at issue and on the calendar of this court at the present December term thereof, was on the 3rd day of said month, being still of said term, tried by the court; Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer, Esq., for the defendants. I find the following as the facts duly admitted, or proven on such trial.

That on the 19th day of February, 1895, the defendant, Joseph A. Sawyer, was, and for a long time prior thereto had been the owner in fee of the premises described in the complaint and in the occupation of the same, and that the same consisted of an improved farm with many valuable buildings and improvements thereon. That on that date the said defendants were indebted to the plaintiff in a large sum of money and that there were then certain liens and claims against said premises, which the plaintiff either paid or had assigned to himself; so that on that date defendant
123 Joseph A. Sawyer was indebted to the plaintiff in the sum of twenty thousand four hundred dollars, and that the deed from the said defendants to the plaintiff mentioned in the pleadings was executed as security for the repayment to the plaintiff of said sum with interest thereon in the sum of one hundred dollars ($100) each and every month until said principal should be paid, said principal to run as long as said defendants desired and such interest was promptly paid. That the deed from said defendants to the plaintiff, the deed from the plaintiff to the defendant, Nellie A. Sawyer, deposited with the defendant L. C. Woodman, and the agreement set up in the pleadings, were all executed at the same time and as a part of the same transaction. That the defendants Joseph A. Sawyer and Nellie A. Sawyer have failed to comply with

the terms of said agreement by omitting and neglecting to pay interest for the month of January, 1896, and the months since that date.

As conclusions of law, I find:

That the instruments mentioned and set up in the pleadings constitute an equitable mortgage upon the premises therein described, and that upon default in the payment of the sum secured thereby plaintiff was entitled to foreclose the same. That there is due thereon from the defendant at the date of these findings the sum of eleven hundred thirty-five and eighty-three one-hundredths dollars ($1,135.83). That the plaintiff is entitled to judgment for said sum and for foreclosure and sale of the premises in question for the amount due as aforesaid in accordance with law and the practice of this court in such cases made and provided, unless the defendant Joseph A. Sawyer or the defendant Nellie A. Sawyer, shall,
124 before the entry of such judgment pay to the plaintiff or into court for his use, the amount so due with interest and costs.

Let judgment be entered accordingly.

By the court.

THOMAS S. BUCKHAM,
District Judge.

Dated December 21st, 1896. Filed January 2d, 1897.
GEORGE W. PEACHEY, *Clerk.*

EXHIBIT 6.

Plaintiff's Motion to Amend Findings of Law and Fact, and to Amend Their Complaint.

Venue and title as above.

To Joseph A. Sawyer, Esq., attorney for above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer:

Please take notice: That the above-named plaintiff will, on the 13th day of February, 1897, at 9 o'clock a. m. of said day, move the court at his chambers in the city of Faribault, Rice county, Minnesota, for leave to amend the findings of law and fact in the above-entitled action, so that they shall read as hereinafter set out, attached and marked "Exhibit A."

And that the plaintiff will at the same time and place, move said court for leave to amend the complaint in said action to correspond with the facts proved and admitted upon the trial of said action so that it will read as hereinafter set out which said complaint as so amended is hereto attached, marked "Exhibit B."

And notice is further hereby given that the motion heretofore made by you in said matter will be brought up for hearing at the same time and place.

Dated February 1st, 1897.

WHEELOCK & SPERRY,
Plaintiff's Att'ys, Owatonna, Minn.

125 "EXHIBIT A," Attached to Above Motion.

Venue and title as above.

This action being at issue and on the calendar of this court at the present December term thereof, was, on the third day of said month, being still of said term tried to the court; Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer Esq. for the defendants. I find the following as the facts, duly admitted or proven on such trial: That on the 19th day of February, 1895, the defendant Joseph A. Sawyer was, and for a long time prior thereto had been, the owner in fee of the premises described in the complaint and in the occupation of the same, and that the same consist of an improved farm, with many valuable buildings and improvements thereon. That on that date said defendants were indebted to this plaintiff in a large sum of money, and that there were then certain liens and claims against said premises, which the plaintiff either paid or had assigned to himself; so that on that date defendant, Joseph A. Sawyer, was indebted to the plaintiff in the sum of twenty thousand four hundred dollars, and that the deed from said defendants to the plaintiff mentioned in the pleadings was executed as security for the repayment to the plaintiff of said sum with interest thereon in the sum of one hundred dollars each and every month until said principal should be paid, said principal to run as long as defendants desired and such interest should be promptly paid. That the deed from the defendants to the plaintiff, the deed from the plaintiff to the defendant Nellie A. Sawyer, deposited with the defendant L. C.
126 Woodman, and the agreement set up in the pleadings, were all executed at the same time and as a part of the same transaction. That the defendants Joseph A. Sawyer and Nellie A. Sawyer have failed to comply with the terms of the said agreement by omitting and neglecting to pay interest due for the month of January, 1896, and the months since that date, and that no part of said principal sum of twenty thousand four hundred dollars ($20,400) has been paid.

As conclusions of law I find:

That the instructions mentioned and set up in the complaint constitute an equitable mortgage upon the premises therein described, and that upon default in the payment of the sum secured thereby plaintiff was entitled to foreclose the same. That there is due thereon from the defendants, Joseph A. and Nellie A. Sawyer, as such unpaid interest the sum of — dollars. That by reason of such default plaintiff is also entitled to recover herein said principal sum of twenty thousand four hundred ($20,400) dollars; that the plaintiff is entitled to judgment for said sum of — dollars and for foreclosure and sale of the premises in question by the sheriff of Steele county, Minnesota, in accordance with the provisions of the law relating to real estate on execution and the practice in this court in such case made and provided, and the proceeds thereof applied: First—to payment of the costs and disbursements of this action; second—to

the costs and expenses of foreclosure; third—to the payment of the amount of interest found to be due; and fourth—the balance to be applied to the principal sum due on said mortgage unless defendants, Joseph A. Sawyer and Nellie A. Sawyer, shall before the entry of such judgment pay to the plaintiff or into court for his use the amount of interest so found together with interest and costs.

127 Let judgment be entered accordingly.

BY THE COURT.

EXHIBIT "B," Attached to said Motion.

Venue and title as above.

That, heretofore, to wit, on the 19th day of February, A. D. 1895, the defendants, Joseph A. Sawyer and Nellie A. Sawyer, were the owners of and in possession of the following-described premises, (here describing said lands described in the original complaint, as therein described).

That on said day said defendants, Joseph A. and Nellie A. Sawyer, made, executed and delivered to said Daniel S. Piper a warranty deed of all said premises.

2. That on said day this plaintiff entered into a contract with the defendants, Joseph A. and Nellie A. Sawyer, wherein and whereby this plaintiff was to execute a deed to Joseph A. and Nellie A. Sawyer, or either of them, of the above-described premises and deposit the same in the hands of defendant, L. C. Woodman, in escrow, to be delivered to said defendants, Joseph A. and Nellie A. Sawyer, whenever they should fully comply with the terms and conditions of said contract; that a copy of said contract is hereto attached and made a part hereof and marked "Exhibit A."

3. That plaintiff did on said 19th day of February, 1895, make and execute a deed of said premises to said Nellie A. Sawyer, and deliver the same in escrow to said defendant, L. C. Woodman, a copy of which deed is hereto attached and made a part hereof and marked "Exhibit B," and that said plaintiff has in all respects complied with his part of the terms and conditions of said contract.

128 4. That in and by the terms of said contract said Joseph A. and Nellie A. Sawyer were to pay this plaintiff the sum of one hundred dollars on or before the last day of February, 1895, and on or before the last of each and every month thereafter continuously, as interest, and on so doing and on the payment of the further sum of twenty thousand four hundred ($20,400) dollars, the said defendants, Joseph A. and Nellie A. Sawyer, were to be entitled to the delivery to them of said deed so deposited in escrow by this plaintiff with L. C. Woodman, and not otherwise.

5. That in and by the terms of said contract and agreement it was contracted and agreed that upon the failure of the parties of the first part to pay said monthly payments, all of their rights under said contract should cease and determine, and that by reason of the failure of said Joseph A. and Nellie A. Sawyer to pay the amount due on or before the last day of January, 1896, all of their rights under said contract did cease and determine.

6. That these defendants, Joseph A. Sawyer and Nellie A. Sawyer, have continued in the possession and occupancy and use of said premises ever since, which said premises consist of an improved farm in a high state of cultivation, with many valuable improvements thereon.

7. That said defendants have wholly neglected and failed to comply with the terms of said agreement and have wholly failed to pay the sum of one hundred dollars ($100) per month or any part thereof during the months of January, February, March, April, May, June, July, 1896, and have wholly failed and neglected to pay any part or portion of the said sum of twenty thousand four hundred
129 ($20,400) dollars, and have wholly failed to pay any sum whatever except the amounts due for the year A. D. 1895.

8. That said defendants, Joseph A. Sawyer and Nellie A. Sawyer, have ever since the first day of January, 1896, wrongfully and unlawfully withheld from the possession of plaintiff the premises above described.

9. That prior to the commencement of this action this plaintiff demanded and caused to be demanded of said defendants the possession of said premises, all of which have been refused.

10. That prior to the commencement of this action plaintiff demanded of this defendant, L. C. Woodman, the delivery to this plaintiff of the deed of said premises so held in escrow by this defendant, L. C. Woodman, which demand was refused.

Wherefore plaintiff demands judgment against the defendant, L. C. Woodman, for the delivery to this plaintiff of the deed so held in escrow by him, and demands judgment against the defendants, Joseph A. and Nellie A. Sawyer, for the amount due this plaintiff thereon as interest and that said deeds and contract be declared a mortgage on said premises and that the same be foreclosed, and the premises in said complaint described, sold in accordance with law and the practice of this court, and the proceeds thereof applied to the payment of the costs and disbursements of this action, and the costs and expenses of foreclosure and the payment of the amount found due herein as interest and the balance to be applied on the principal sum due on said mortgage, and for such other and further relief as to the court shall seem just and equitable, and for the costs and disbursements of this action.

WHEELOCK & SPERRY,
Plaintiff's Attorneys, Owatonna, Minn.

130 Duly verified by the plaintiff in person.

Defendants' Notice of Motion.

Venue and title as above.

To the above-named plaintiff and to Messrs. Wheelock & Sperry, his attorneys.

Please take notice: That the motion to amend the court's findings of law in the above-entitled action, hereto attached, is based upon the pleadings and findings of fact therein, and is made and

will be argued upon the ground that the above-entitled action is brought for a purpose exclusive of the relief ordered in said findings of law: That the complaint therein does not allege facts sufficient to warrant such relief, but, on the contrary, does allege facts obnoxious thereto.

Also, that by said findings of fact each and every issue raised by said pleadings is found in defendants' favor, and that every material allegation in said complaint is negatived therein.

J. A. SAWYER,
Attorney for Moving Defendants.

Dated at Owatonna, Minn., this 9th day of January, 1897.

Defendants' Motion to Amend Findings.

Venue and title as above.

The above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer, hereby move the court to amend its findings in the above-entitled action as follows, to wit:

1. To strike out the entire conclusion of law therein.
2. To substitute for said finding of law the following: "That the instruments mentioned in the pleadings, to wit, the contract
131 and the two deeds evidence one and the same transaction and agreement and constitute an equitable mortgage. That at all times mentioned in the pleadings the defendants, Joseph A. Sawyer and Nellie A. Sawyer, were and now are the owners of all the premises described in the complaint. That the plaintiff, not having instituted any action or proceeding to foreclose such equitable mortgage, and having elected in this action not to allege any facts upon which a foreclosure thereof can be ordered or had, is entitled to no relief herein. That said defendants are entitled to judgment for their costs and disbursements herein. Let judgment be declared accordingly."

Dated at Owatonna, Minn., this 9th day of January, 1897.

J. A. SAWYER,
Attorney for Defendants.

Substituted Findings and Order for Judgment.

Venue and title as above.

Findings of fact and conclusions of law having been heretofore filed in the above-entitled action, both the plaintiff and the defendants, Joseph A. Sawyer and Nellie A. Sawyer, moved the court to amend such findings and conclusions in the particulars set out in their respective notices of motion on file with the clerk of this court, and such motions were heard together by consent, at my chambers in the city of Faribault, in Rice county, on the 13th day of February, 1897, Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer, Esq., for the answering defendant.

Ordered, that the conclusions of law be modified by substituting

for those in the original decision as filed, the following to
132 wit: "That the defendants are entitled to have this action dismissed without prejudice to plaintiff's right of action to foreclose his equitable mortgage set forth in the answer and have judgment so dismissing the case, but without costs. Let judgment be entered accordingly."

THOMAS S. BUCKHAM,
District Judge.

Filed February 20, 1897.

EXHIBIT 8.

Judgment of Dismissal.

Venue and title as above.

This action being at issue and on the calendar of this court at the regular December 1896 term thereof, was on the third day of said month, being still of said term, tried to the court, Messrs. Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer Esq. for the defendants. And the court, after hearing the evidence adduced on such trial and duly considering the same, duly made and filed its findings, conclusions of law and order for judgment therein, and thereafter, and on the 13th day of February, 1897, the court heard the motion of plaintiff and defendants by consent of the parties thereto at his chambers in the city of Faribault, Rice county, Minnesota, Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer for the defendants. And the court thereafter and on the 20th day of February, 1897, duly made and filed its modified order, substituting the following conclusions of law for those in the former order which was filed January 20th, 1897, viz: That the defendants are entitled to have this action dismissed without prejudice to
133 plaintiff's right of action to foreclose his equitable mortgage set forth in the answer, and to have judgment so dismissing the same, but without costs.

Now therefore, pursuant to said order and on motion of Messrs. Wheelock & Sperry it is hereby adjudged, determined and decreed that said action be, and the same hereby is dismissed without prejudice, right of action to foreclose his equitable mortgage, and without costs herein.

Signed and dated this 20th day of April, 1897.

G. W. PEACHEY,
Clerk of District Court.

Filed April 20th, 1897.

G. W. PEACHEY,
Clerk of District Court.

Amended Findings and Order.

Venue and title as above.

The above-entitled action having been heretofore tried by this court and findings and decision of the court made and filed and

judgment having been heretofore entered and an appeal from such judgment having been taken by defendants to the supreme court of said State which appeal has been tried and determined and the decision of said supreme court therein duly filed and judgment thereon duly entered reversing and setting aside the judgment so appealed from and all proceedings subsequent thereto in the enforcement of such former judgment of this court, and directing this court to modify and amend its findings as hereinafter set out; and said cause having been duly remanded to this court for that purpose and for further proceedings accordingly; and the cause having come
134 before the court at the court-house in the city of Owatonna, Steele county, Minnesota, in said district at the general term of said court commencing on the 6th day of December, A. D. 1898, upon the motion and application of said plaintiff, upon due notice given to said defendants, to have such amendment and modifications to said findings duly made and filed by this court, Messrs. Wheelock & Sperry and Robert Taylor, plaintiff's attorneys appearing in support of such application and H. E. Leach Esq. appearing on behalf of defendants upon such application. On motion of plaintiff's said attorneys, and in accordance with said decision and judgment of said supreme court the said former findings of this court herein are hereby modified and amended as follows:

I.

The last clause of the eighth finding of fact and all of the ninth finding of fact are hereby stricken out, and instead thereof the following is inserted, viz:

Ninth. Upon the said contract and transaction of February 19th, 1895, which is an equitable mortgage into which all the others have become merged and extinguished, there is at the date of these amended findings, due to the plaintiff the sum of twenty-three thousand and nine hundred dollars.

II.

The former conclusions of law herein, of this court be, and they are amended so as to read as follows, to wit: As conclusions of law herein the court finds: That said transaction of February
135 19th, A. D. 1895, was and is an equitable mortgage into which all said other mortgages became and are merged and thereby extinguished; and that, default having been made in the terms and conditions of said equitable mortgages, as aforesaid, the plaintiff is entitled to judgment of foreclosure thereof for the said amount of twenty-three thousand nine hundred dollars, so due thereon and for his costs and disbursements herein to be taxed and included in such judgment and for the costs of foreclosure sale, and that such foreclosure be made by sale of the lands covered by said equitable mortgage in accordance with law, subject to redemption as provided by statute.

In all other respects said former findings and decision are hereby affirmed. Let judgment be entered accordingly.

Dated this 8th day of December, 1896.

THOMAS S. BUCKHAM,
District Judge.

The above and foregoing case, having been by me examined and found conformable to the truth is by me on this 17th day of January, A. D. 1899, allowed, approved and signed as such case in the action therein described. And I further certify that the same contains true and correct exemplifications and records of all proceedings in this court had after the remand of said cause and of all offers, motions, rulings, orders, objections and exceptions therein had and taken.

Dated at Faribault, Minn., this 17th day of January, 1899.

THOMAS S. BUCKHAM.

136 STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

The judgment heretofore entered herein on the 19th day of August, A. D. 1897, having been upon appeal to the supreme court, set aside and the cause having been remanded to this court with direction of the supreme court for the amendment in certain particulars of the findings of the court herein and such amendments to such findings having been duly made and filed herein and the plaintiff's costs herein having been duly taxed and allowed at the sum of thirty-five and twenty one-hundred- dollars.

Now therefore, on motion of Wheelock & Sperry, and Robert Taylor Esq., attorneys for said plaintiff and in accordance with said findings of this court so amended, it is hereby adjudged and decreed as follows:

I.

That the agreement of February 19th, 1895, set forth in the complaint and the transaction of which it was a part did and does extinguish by merger all of the former notes and mortgages in said complaint set forth; that the said agreement and transaction of February 19th, 1895, was and is an equitable mortgage of all of the lands therein described, to wit: The south half of the southwest quarter and the northeast quarter of the southwest quarter, and the west one-fourth of the southeast quarter of section twenty-
137 one (21) and northwest quarter, and the undivided half of the west half of the northwest quarter, of the southwest quarter of section twenty-eight (28), and the northeast quarter, and the north

half of the southwest quarter, and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), and the north half of the northeast quarter, and the north half of the northwest quarter, and the southwest quarter of the northwest quarter of section thirty-two (32), all in township one hundred and seven (107) north, range twenty (20) west, in said Steele county, Minnesota, containing in all seven hundred and ninety acres (790), more or less.

That the amount that is due upon said equitable mortgage at this date is the sum of twenty-four thousand and ninety-nine and $\frac{82}{100}$ dollars in principal and interest, and the further sum of thirty-five and $\frac{20}{100}$ dollars ($35.20) costs and disbursements taxed and allowed herein.

II.

It is further adjudged, that said equitable mortgage is a lien upon all of said lands for the amount so due thereon and that the same be foreclosed by a sale of said lands or so much thereof as shall be sufficient to satisfy the amount so due with the costs of sale, and that said lands be sold accordingly by the sheriff of said county or his deputy, according to the provisions of law relating to sales of real estate on execution. That said sheriff give public notice of such time and place according to law; that said plaintiff may become the purchaser at such sale if he shall be the highest bidder thereat and that the sheriff make due report to the court of such sale when made, and upon such confirmation, execute and
138 deliver to the purchaser or purchasers at such sale the usual certificates as provided by law. That out of the proceeds of such sale, after deducting the amount of his fees and disbursements on such sale, the sheriff pay to the plaintiff's attorneys the sum of thirty-five and $\frac{20}{100}$ ($35.20) dollars, the costs and disbursements aforesaid, with interest thereon from this date; and also the said amount adjudged to be due to the plaintiff on said equitable mortgage with interest thereon from date hereof, if such proceeds of such sale be sufficient for that purpose and if there be any surplus money arising from such sale that he bring the same into court to abide the further order of the court herein.

III.

It is further adjudged and decreed, that said defendants and all persons claiming under them be thereupon forever barred and foreclosed of all right, title and equity of redemption in and to said mortgaged premises so sold except only the right of redemption from such sale according to law.

That plaintiff recover of the defendants, J. A. Sawyer and Nellie A. Sawyer, his said costs and disbursements of thirty-five and $\frac{20}{100}$ ($35.20) dollars.

Dated this 19th day of January, 1899.

GEORGE W. PEACHEY,
Clerk of said District Court.

[Seal of District Court.]

139 STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER and NELLIE A. SAWYER, Defendants.

To the plaintiff above named and to Messrs. Wheelock & Sperry and Robert Taylor, his attorneys, and to G. W. Peachey, clerk of court:

Please take notice—That the above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer, appeal to the supreme court of the State of Minnesota from the judgment rendered and entered in the above-entitled cause on, and dated on the 19th day of January 1899, finding the amount due on the equitable mortgage described therein and ordering the lands therein described to be sold to satisfy such amount. Said appeal is taken from the whole of said judgment.

Dated at Owatonna Minnesota this fifth day of July, 1899.

J. A. SAWYER,
Att'y for Defendants.

STATE OF MINNESOTA, } ss:
County of Steele, }

Harlan E. Leach, being first duly sworn, says that at the city of Owatonna, in said county and State, on the 15th day of July A. D., 1899, he served the hereto-attached notice of appeal upon Messrs. Wheelock & Sperry, a firm composed of L. L. Wheelock and W. A. Sperry, and Robert Taylor personally, by then and there handing to and leaving with said W. A. Sperry,
140 one of the members of said firm of Wheelock & Sperry, a true and correct copy of said notice of appeal; said Wheelock & Sperry and Robert Taylor being then and there the attorneys of the plaintiff in the above-entitled action.

HARLAN E. LEACH.

Subscribed and sworn to before me this 17th day of July, 1899.

GEORGE W. PEACHEY,
[SEAL.] *Clerk of District Court, Steele County, Minn.*

141 STATE OF MINNESOTA, ss:

Supreme Court, October Term, 1899.

DANIEL S. PIPER, Respondent,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. Woodman, Defendants; Joseph A. Sawyer and Nellie A. Sawyer, Appellants. } Appellants' Brief.

Assignments of Error.

I.

The court erred in denying defendants' motion for leave to file their supplementary answer.

II.

Erred in excluding that answer at the hearing in open court at the regular December, 1898, term thereof.

142 III.

Erred in excluding the record evidence then offered by the defendants.

IV.

Erred in ordering judgment against the defendants.

V.

Erred in not holding that the plaintiff had waived all right to foreclose the equitable mortgage.

VI.

Erred in not holding that the plaintiff had elected to pursue an inconsistent remedy and had precluded himself from foreclosing the equitable mortgage.

VII.

Erred in depriving defendants of their right to present their defense and to be heard thereon.

VIII.

Erred in depriving defendants of their property without due process of law.

IX.

Erred in denying to defendants the equal protection of the laws.

Statement of Facts.

Appeal by the defendants, Sawyer, from a judgment entered after the remand upon the former appeal. 76 N. W. R. 57.

Upon that remand appellants moved to file their supplementary

answer. Plaintiff moved for amended findings and judgment thereon without opportunity to appellants to present any defense.

Upon an adjourned hearing plaintiff withdrew his motion.

143 Thereafter appellants renewed their motion to file their supplementary answer, which was resisted by plaintiff and denied. Upon a new motion by plaintiff, the court did amend its findings and order judgment of foreclosure of the contract thereon, which was entered and this appeal taken therefrom upon a settled case.

The court refused defendants' proffered defense and excluded all evidence in support thereof offered at the hearing. The evidence so offered and excluded shows these facts—in July 1896, the plaintiff brought an action in ejectment against these three defendants based upon the contract here foreclosed demanding also damages for the retention of the lands.

The complaint was duly verified by the plaintiff and in it he alleged that he was the owner in fee of the land under this contract and the deed accompanying it. Answer and reply.—Findings that the contract and deed constituted an equitable mortgage, which was ordered foreclosed.

Upon the filing of such findings and order, appellants moved to amend the same and for judgment of dismissal. Plaintiff moved to file, *nunc pro tunc*, an amended complaint alleging defendants to be the owners, that the contract and deed constituted a mortgage and praying its foreclosure.

The motions were heard together, the court denying that of the plaintiff and granting that of appellants.

Thereafter, without notice, plaintiff caused judgment of dismissal, without costs and without prejudice, to be entered—appellants having no knowledge thereof until the service of the reply herein, and brought this action to foreclose the four formal mortgages.

144 At the opening of the trial, appellants formally offered that judgment be entered without contest—foreclosing the contract, which offer was refused by plaintiff.

Before submitting the case to the trial court, appellants withdrew the offer. Judgment being ordered and entered foreclosing the four mortgages, the former appeal was taken.

Appellants claiming those mortgages to have been merged in and terminated by the contract, and that no foreclosure of the contract should be ordered under the complaint herein.

Appellants' Position.

I.

The defense offered and sought to be interposed, is not excluded by the former decision of this court.

II.

The supplementary answer states a valid defense.

III.

The evidence offered and excluded, sustained such defense and would warrant findings and judgment of dismissal of this action.

IV.

Under the circumstances then existing, such evidence should have been admitted and the defense thereby offered decided.

V.

By the rulings and judgment, the appellants are deprived of their rights under the Constitution of the United States, in this, viz: they are deprived of their property without due process of law; and are denied the equal protection of the laws.

145 *Points and Authorities.*

I.

This defence is not excluded. No defense to any existing rights to foreclose the contract was presented to nor decided by the trial court. Hence could not be in this court.

Marcutt *vs.* Marquette R'y Co. 47 Mich. 1.
Woodbridge *vs.* Sellwood, 65 Minn. 135, 67 N. 799.
Hove *vs.* Bankers' etc. Bank, (Minn.) 77 N. W. 967.
Combs *vs.* McDonald, 43 Neb. 632—62 N. 41.
Maxwell *vs.* Graves, 59 Ia. 613—13 N. 758.
Bartemeyer *vs.* Iowa, 18 Wall 129–135.

Plaintiff expressly refuses, at the opening of the trial, to take any judgment other than that demanded and ordered, viz: foreclosure of the four mortgages, appellants could not interpose this defense, and need not have raised the question of practice on that appeal—but since in case of reversal, it would lie at the threshold of further proceedings, they did. But it is to be noted that they raised and submitted no more than the question of pleading and practice—not at all any matter of defense as against a right then in plaintiff to foreclose the contract. Indeed it was not possible at that time to raise this defense. It did not exist. In part, it is a conclusive election of remedies and an election, at the trial, between inconsistent causes of action. When that appeal was submitted, such election had not become conclusive in the sense of excluding further prosecution—could not until judgment of reversal had been entered.

Plaintiff still stood upon that judgment—it remained in force.
146 He could continue to stand upon it until the final decision (judgment) reversing it, or *at any time prior* to such final decision, he could withdraw, take a dismissal, or amend and claim under the contract.

Thomas *vs.* Josten, 36 Minn. 1–3.
Ward *vs.* Green, 30 S. W. R. 864–866.

In a case like this, it is only where a party "pursues his chosen rights to final judgment" that the estoppel or waiver by election becomes final and conclusive.

"Where a party having a choice of remedies pursues one of them "to *final judgment*, he thereby makes an election by which he must "be held to be estopped, and he cannot have successive suits *in order* "*to determine whether or not he might recover*, upon a phase of the case "not presented at first."

Ward *vs.* Green, Tex., S. W. R. 866.

The expression by word or act of a preference between two courses does not estop from following, nor waive another right or remedy—else the mere service of a summons upon the one would bar
147 the other. There exists a "*locus penitentæ*." But when the selected right and remedy are insisted upon until it merges in or is extinguished by final judgment, then the door is closed. The party has had his full day in court—and can have no other. It is in the nature of *res adjudicata*, and rests upon identical grounds of public policy. *Nemo bis vexari pro eadem cause: Interesse rei publicæ ut finis sit litium.*

Not being before the court, nor necessary to the decision reversing the judgment, any remarks in the opinion bearing upon such defense (if there be such) are dicta. That opinion and judgment become the law of the case to the extent that plaintiff was not prevented by his pleading, from seeking a foreclosure of the contract in this action, but no further.

It did not and could not decide upon the validity of any defense defendant might interpose nor prevent them from interposing and litigating the same.

Wixson *v.* Devine, 80 Cal. 385, 22 p. 224–225–.8
See S. C. 67 Cal. 346 p. 779.
Hart *v.* Stripling, 25 Fla. 433–680 456:459.
Adams Co. *v.* B. & Mo. R'y 55 Ia. 94–44 Ia. 335 39 Ia. 505.
Chicago etc. R'y *v.* Swan, 120 Mo. 30, 25 S. W. 534.

II.

Supplementary answer states a defense.

In the matters therein alleged are matters of record in the
148 trial court, and in suits between those identical parties concerning plaintiff's rights under this contract and in the same lands—no possible question thereof as to the absolute truth of its allegation.

The facts shown are—that at the outset the plaintiff sued these defendants in ejectment demanding possession of the lands and damages for their withholding—basing such demands solely upon this contract and the deeds which are part of it. The trial court held the contract to be an equitable mortgage. Thereupon plaintiff moved to amend and procure the foreclosure of the equitable mortgage in that action. Failing in that he caused the entry therein of judgment of dismissal—and at once brought this action

to foreclose—not the equitable mortgage, but the former formal mortgages, and at the trial, refused to accept any other relief.

With knowledge of all the facts and the law, he elected to stand upon the former mortgages—and at the trial elected between the inconsistent causes of action shown in his complaint, and then by his refusal of all the relief to which he would have been entitled had he followed his real cause of action and sought his actual remedy, he precluded and estopped himself from asserting—when charged that he had elected his remedy—that he had but followed a vain quest, sought an impossible remedy.

Heckman *v.* Young, 134 N. Y. 170.

By the offer of judgment foreclosing the contract, the course elected to be pursued by plaintiff became issuable in complete relief to him.

149 Having refused that offer and thereby compelled defendants to litigate the matter throughout the trial court, and their appeal to this court, is estopped to assert that he but sought an impossible remedy upon a non-existing cause of action. The reason giving rise to that exception is that in such case it is impossible to secure a final disposition of the case on the merits. 7 Enc. Pl. & Prac. 365 note.

By refusing the proffered complete relief, and insisting upon that demanded until final judgment in this court against him, he conclusively waived the other remedy—and is bound by his election, made when he brought this action, between inconsistent remedies. The offered remedy was not withdrawn until the submission of the case upon briefs subsequent to the trial. Knowing during all that time that under that offer his suit as brought and insisted upon was, at least, by the offer, made effective in full relief,—he chose to insist upon his demands for the large additional sums demanded, his election then made, relates back to, and vivifies his original election between the inconsistent remedies, each of which thereby becomes available to him in full relief.

The causes of action and the remedies thereupon are incon-
150 sistent. The complaint alleges (fol. 34 former P. B.) that plaintiff had declared a forfeiture by defendants of all rights under the contract, the finding (fol. 150 do.) set forth that declaration, and the judgment (fol. 169 do.) determines as matter of law and fact, that all defendants' rights under the contract had ceased and determined.

In respondents' former brief (p. 11) he states this position in effect that the contract was *functus officio* and could not be foreclosed—the contract could secure (collaterally) no more than the $20,400, while the mortgages secure other and larger sums. Electing to stand upon the latter, the plaintiff perforce, disclaimed the former, and treated it as of no present force—as no security. But he now claims that the mortgages were extinct and the contract alone of force. He then repudiated the $20,400 of the contract and demanded $23,000 of the mortgages.

Now he treats the latter as non-existing, and the former as actual.
Thompson *v.* Howard, 31 Mich. 309: 62 N. 345.
Thomas *v.* Watt, 104 Mich. 201 and cases cited.

The remedies are inconsistent. The action to foreclose the mortgages was at law—and upon the statute.

151 The action to foreclose the contract is one strictly in equity.

The former action was upon several distinct causes of action—the latter upon one only. The former gave, which the latter refuses, the stipulated attorneys' fees.

To constitute an election of remedies it is not essential that at all times some remedy is available in the course elected.
Nield *v.* Burton, 49 Mich. 53. 12 N. W. 906.
Thomas *v.* Watt, 104 Mich. 201. 62 N. W. 345.

Nor is it material that the complaint, construed under the decisions of this court, may authorize recovery upon either cause of action. It is the election and prosecution as a matter of fact, that is essential.
7 Enc. Pl. & Prac. 362 note.

Election goes not to the form but to the essence of the remedy. It applies to a case where the law, not the practice supplies to a party two or more modes of procedure predicated upon conflicting theories.

152 III.

Plaintiff at the trial, was required to, and did elect between two inconsistent causes of action.
That the two are inconsistent is shown above.
That he could be required to elect follows.
By their offer of full relief upon one cause of action, defendants in effect required him to elect.
But whether or not required so to do, the plaintiff did elect by refusing the offer.

IV.

The evidence offered and excluded supports every averment in the supplementary answer. Hence sufficient to warrant findings for defendants.

V.

Respondent contended, in opposition to the filing of the supplementary answer that all its averments were already in the record—hence before the court without further pleadings. Upon that ground defendants needed no new trial—hence needed not to seek it.
But plaintiff moving for judgment upon the record, it was competent to defendants to oppose such motion by showing by the records that plaintiff was not, but that defendants were entitled to judgment.
The evidence offered—being of record should have been received and considered by the court. Its exclusion was error.

VI.

153 While no new trial was directed by this court yet it was competent for the trial court to direct a new trial in whole or in part upon application.

Adams Co. *v.* B. & M. R'y. 44 Ia. 335.
Adams Co. *v.* B. & M. R'y. 55 Ia. 94. 2 N. W. 1056.
Nat'l Inv. Co. *v.* Nat'l Bldg. etc. Co. 51 Minn. 198–200.

But a new trial would be bootless unless the supplementary answer was allowed. Hence proper for defendants to first move to file such answer, and upon denial of that motion, they were not required to move farther.

Ency. Pl. & Prac.

VII.

By the orders and judgment of the trial court, defendants were pr-cleuded from a day in court, upon their defense.

And were deprived of their property without due process of law.

And denied equal protection of the laws.

Since facts not in the record cannot be presented by affidavit or certificate, to obtain a re-argument (Smith *v.* St. Paul, 72 N.
154 W. 210) and since the defense upon the merits was not before this court, its denial of the petition to amend opinion etc. is understood to rest upon the ground here stated and not to indicate an intention by this court to go beyond the record.

Backus *v.* Burke, 52 Minn. 113.

It is respectfully submitted that the judgment should be reversed, and the cause remanded with direction that defendants be allowed to renew their motion to file their supplementary answer.

———,
Att'y for Appellants, Owatonna, Minn.

155 STATE OF MINNESOTA:

Supreme Court, October Term, 1899.

DANIEL S. PIPER, Respondent,
against
JOSEPH A. SAWYER ET AL., Appellants.

Reply Brief by Appellants.

The defense of waiver and by election was not before this court upon the former appeal. To construe that decision as *res adjudicata* here is to make it a nullity.

The sole then assignment of error now pertinent is No. 5, viz. "The court erred in not ordering judgment of dismissal." At that trial below and here respondent stood upon his ground that the four formal mortgages remained in force, and insisted upon the remedy of their foreclosure. The trial court holding with him, could not and did not consider any other matter.

Respondent sold the lands under the judgment there demanded and entered. Appellant need have raised no other assignment of error, but submitted the above only as matter of pleading and prac-

tice and upon the grounds, (1) insufficiency of the complaint, and (2) that plaintiff could not so change position. All confined to this point, that in this action no foreclosure of the equitable mortgage could be had.—Former Brief, p. 27—76 N. W. 58, Paper Book, fo. 56.

Respondent cannot be heard here to claim this matter as then decided. In his then brief (p. 4, fo. 9) he rightly treated
156 the matter as one solely of pleading. As clearly he stated his then position, viz: That in no event was any foreclosure of the equitable mortgage possible unless, perchance, for the monthly payments then due. His brief pp. 11–13, fos. 30–31–34–35. In the trial court he then was equally precise. His complaint alleged a total forfeiture of all rights under the contract, and a prior demand for possession of the lands based thereon. He claimed nothing under the contract save that by the default in meeting its monthly payments the powers of sale of the formal mortgages became operative, and applied the payments made under the contract, not upon the sum due under the equitable mortgage, but as part payments of the accrued interest upon the notes secured by the former, and demanded judgment for the sums so secured—larger by thousands of dollars than that fixed and secured in the latter. These claims are carried into the then findings and judgment of the trial court. "Default has been made in the terms of said agree-"ment—and that said agreement and the rights of said defendants "thereunder, be, and they are determined, and have ceased." (1st P. B. p. 57, fo. 169 p. 51 fo. 150.) That judgment applied those payments as above and was for the amounts due by the terms of those notes with specified attorneys' fees, etc., being for nearly $3,000.00 in excess of the total sums then payable by the terms of the contract.

Adhering to the end to these positions and demands respondent cannot now insist upon such construction of the former opinion to establish in his favor as the law of the case what was not then claimed by either party and is in direct conflict of his then position and demand.

But his construction nullifies that portion of that opinion, mandate and judgment. The defense offered below, but there refused consideration, did not exist and could not be presented or argued upon the appeal. Appellants were not and could not then be heard upon it. All which appears upon the record. Therefore any attempted decision thereon at that time could be no more than a nullity.

157 Windsor *vs.* McVeigh 93 U. S. 277.
McCoy *vs.* McCoy 29 W. Va. 795.
Jones *vs.* Davenport 40 N. J. Eq. 77.
Reynolds *vs.* Stockton 140 U. S. 254.
Seamster *vs.* Blackstock 83 Va. 233.
Falls *vs.* Wright 55 Ark. 562.
Ringgenberg *vs.* Hartman 124 Ind. 186.
Ex parte Nielsen 131 U. S. 176.
Ex parte Zeehandelaur 71 Cal. 238.
Mitchell *vs.* Insley 33 Kan. 654.

In McCoy *vs.* McCoy *supra* Green, J., writing the opinion, considers this matter fully. Therein it is held that "if the status of "the suit, when the decree was rendered, was such that any of the "parties had then or prior thereto, the opportunity to present any "proof as to the facts bearing on these points decided and had no "opportunity to be heard on the law involved in the decision when "it was rendered, he could not be bound by such a decree as *res* "*adjudicata*. It matters not that when such decree was rendered, "such person was a party to the suit, if for any reason he had no "opportunity to be heard." Again the principles of *res adjudicata*, "Must yield to the still more fundamental principle that no one can "be bound by any judgment or decree, if, when it was rendered, the "record of it shows he had no opportunity to be heard, then or "before, on the questions of law or fact decided, whether the decision "be prejudicial to his rights in the cause in which it is rendered or "be only prejudicial to his rights in a subsequent suit."

In the Seamster case a widow had brought suit to compel the assignment of her dower making the heirs-at-law defendants. The court decreed the assignment of her dower and also the sale of the interests of the heirs. Thereafter one of the heirs, becoming of age, filed a petition, alleging errors and attacking the decree and the sale thereunder but the court dismissed his petition—the purchaser at such sale having paid the full purchase price, which, by
158 order of the court had been invested for the benefit of the minor heirs. It was held that the judgment and sale were void. And that the subsequent decree dismissing such petition of no force. No *res adjudicata*.

In Jones *vs.* Davenport, the syllabus (by the court) is—"A decree "or judgment outside the issues raised by the pleadings, is a nul-"lity."

In Reynolds *vs.* Stockton, the court by Brewer justice, said: "It "is impossible to concede that because A and B are parties to a suit "the court can decide any matter in which they are interested, "whether such matter be involved in the pending litigation or not. "It is only over these particular interests which they choose to "draw in question that a power of judicial decision arises." Again, "A judgment upon a matter outside the issue must of necessity, be "altogether arbitrary and unjust, as it concludes a point upon which "the parties have not been heard. It is upon this very ground that "the parties have been heard, or have had the opportunity of a "hearing, that the law gives so conclusive an effect to matters ad-"judicated. And this is the principal reason why judgments be-"come estoppels. But records or judgments are not estoppels with "reference to every matter contained in them. They have such effi-"cacy only with respect to the substance of the controversy and its "essential concomitants."

Mitchell *vs.* Insley was a suit to foreclose an equitable mortgage—a deed delivered as security. Plaintiff had sued defendant in ejectment claiming under that deed. In that suit the answer was a general denial. The issues therein by agreement were submitted to the court with mutual request to find the facts specifically. The court

found that the deed was delivered as security for a specified sum no part whereof had been paid and that the plaintiff held a lien on the land for that sum, but concluded as matter of law, that his remedy was not by ejectment and ordered judgment of dismissal which was entered. In the foreclosure suit the plaintiff asserted the former finding and judgment to be *res adjudicata* as to the sum un-
159 paid and due. The trial court so held but the supreme court held the contrary.

In Falls *vs.* Wright a widow had petitioned for an assignment of dower in her deceased husband's lands—but her petition in describing them omitted one tract Commissioners were appointed, who assigned her dower in all the lands Upon their report the court entered its decree setting off dower in all. Subsequently the tract omitted in that petition was sold by order of that court—but it refused to confirm the sale on the ground that it had been assigned as dower to the widow. But upon appeal from the refusal to confirm, the circuit court confirmed the sale. The plaintiff claimed title as heir to the deceased husband—his father—the defendants, under such sale and confirmation being remote grantees The attack upon that decree was collateral. Upon the appeal the supreme court held the decree void, as seeking to determine a matter not within the issues and upon which the parties had not been heard. The court cites the passage from Munday *vs.* Vail 34 N. J. Law 320, cited by Judge Brewer as above.

The cases cited above from 131 U. S. and 71 Cal. are cases of *habeas corpus*, and hold similar judgments under which the petitioners were imprisoned to be void. In the latter case the imprisonment was for contempt in refusing to answer at trial a question held by the supreme court not to be material upon the real issue before the court.

In Ringgenberg *vs.* Hartman, it is held that in replevin, wherein the pleadings raise an issue of right to possession only, so much of the judgment as purports to determine the title to be void. This court treats "the law of the case" merely as *res adjudicata*, but no distinction elsewhere taken between the two is material upon this point. Any direction to the trial court which precludes a party from obtaining "his day in court" can be no less unavailing than a final judgment of that effect.

Assigning only the question of pleading, not only were appellants not required to present a defense upon the merits, but such
160 course would have been out of place. No issue was made in the pleadings as to the equitable mortgage, nor as to whether it was enforcible. The complaint did not demand its foreclosure, save in connection with, and as a part of, that of the formal mortgages. Respondent then demanded an affirmance of the judgment foreclosing the latter. It is the relief actually demanded which determines whether or not the point passed upon is *res adjudicata*.

Van Fleet, Former Adjudication sec. 229.
Stannard *vs.* Hubbell, 123 N. Y. 520.
House *vs.* Lockwood 137 N. Y. 259.

In this case Mrs. Lockwood had sued House to obtain a deed executed by him to her alleging title to the land was in her and that the deed had been delivered, but again entrusted by her to him for safe keeping. He answered that Mr. and Mrs. Lockwood had conveyed the land to him as security for certain indebtedness which had not been paid, that he executed the deed in question for delivery when the debt was paid and had never delivered it. The court found each point for that defendant and entered judgment for him upon its findings. He then sued to foreclose the deed as a mortgage and pleaded the former judgment as *res adjudicata*. But the court allowed the Lockwoods to contest, and the jury found for them, viz: That Mrs. L. owned the land the title being in Mr. L. That they deeded to House and he redeeded to Mrs. L. in order to place the record title in her. That no security was intended, nor effected thereby. Upon appeal this was sustained in the supreme court and court of appeals. In the latter it was said, "A judgment "does not operate as on estoppel as to immaterial or unessential "facts, even though put in issue by the pleadings and directly "decided." Also, "Although a decree in express terms professes to "affirm a particular fact, yet, if such fact were immaterial to the "issues, and the controversy did turn upon it, the decree will not "conclude the parties with reference to such fact." Also, "In Wood-"gate *vs.* Fleet," (44 N. Y. 1) "it was held that the parties to a judg-
"ment are concluded or estopped thereby, only as to the facts
161 "or law material to the issue and directly involved in the
"litigation." See sec. 1 Van Fleet Form. Adj. p. 512, and sec. 2, secs 664–676–671. (Law of the case.)

Klauber *vs.* San Diego, etc. Co. 98 Cal. 105 (32 P. R. 876) is decisive upon this claim of *res adjudicata*. Suit to enforce specific performance. Plaintiff had appealed from a judgment for defendant, whereon that judgment was reversed and the trial court was expressly ordered to enter judgment upon its former findings for plaintiff in accordance with the prayer of the complaint, (30 Pac. R. 555–'6–95 Cal. 333). From the judgment so entered, defendant appealed upon a bill of exceptions. Plaintiff set up the prior decision on appeal as *res adjudicata*, but was overruled. The court says (pp. 876–877 p. 32 P. R.) "Being a rule which tends to prevent a judicial "consideration of the case, it is not to be extended beyond the "exigencies which demand its application."—"As it is only when "upon the second appeal, the record presents the same matters, "either of fact or law, upon which the determination of this court "was rendered at the former appeal, that that determination is held "to be final, it follows that if there is presented upon the second ap-"peal a different state of facts or any errors that were committed by "the trial court which were not presented in the former record, this "court is at liberty to consider them as fully as though presented "upon a first appeal."—"If, upon such appeal, there are found in "the record matters which were not determined upon the former "appeal, he has a right to be heard thereon."

In this case the error relied upon antedated the entry of the first

judgment in the trial court and appellants' assignments of error assailed the findings of fact.

In Michigan Trust Co. *vs.* Lansing Lumber Co. (Mich.) 80 N. W. R. 282 the plaintiff as trustee had sued to foreclose defendant company's mortgage and in that suit had a receiver appointed. On appeal the order appointing the receiver was reversed upon the ground
162 that no cause was shown to warrant a foreclosure. Thereafter another action was brought against that defendant and his surety to foreclose the same mortgage and hold the surety for any deficiency. The trial court dismissed it as to the surety upon the ground that by the former decision on appeal it became *res adjudicata* that no grounds for a foreclosure then existed, hence that the taking of the mortgaged property by the receiver was an unlawful interference releasing the surety. But upon appeal this was reversed, the court holding its former decision as to the lawfulness of that attempt to foreclose, was not upon the merits but only as preliminary and incidental to its ruling upon the receivership and that that question was essentially one of pleading only.

But respondent's construction of the former decision, involving as it does, the nullity of the portion relied upon, is not only inadmissible but wholly uncalled for. The rule is universal that any decision must be read in the light of the record before the court. Suppose that upon that remand appellants had fully paid the sum secured or that upon consideration respondent had released his lien or by acts *in pais* estopped himself from asserting it would a supplementary answer setting up those facts have been precluded by that decision? Or had appellants been able to set forth either of these defenses, would they not have been entitled to be heard upon them though denied by respondent? This court in set terms stated the sole question touching this matter then before it, viz: Appellants claim that in this action the contract could not be foreclosed, and also stated the grounds relied upon, viz: Of pleading and practice only. It is settled law here as elsewhere that where judgment is not peremptorily ordered the trial court is at liberty to consider and determine upon any competent matter not before cognizable by the court, and to that end may grant a new trial.

It is also necessary that any matter of defense upon the merits be formally alleged in the answer so that an issue of law or fact may be raised thereon before it can be determined by the court.

The petition for a modification of the opinion filed by
163 appellants, neither afforded them an opportunity to present their defense nor did they thereon in any manner seek a hearing or determination thereon. Anticipating the view respondent would take as to the effect of that decision, as well as its effect upon appellants' efforts to make a just settlement, the two reasons for its filing were plainly stated in the petition, viz: (1) To avoid otherwise certain defeat in their efforts to obtain a settlement and (2) to call the attention of this court to the fact that they had in no manner presented the matter of defense upon the merits to either the trial court or here. For they could but know that if this court had inadvertantly overstepped the record it would promptly correct such

error. The denial of that petition was notice to all that no matter of defense upon the merits was considered or determined by this court. There seems little doubt but that the fact that the matter was remanded to the trial court instead of an entry here of the judgment, or a peremptory order of judgment for respondent for the amount shown by the pleadings to remain unpaid on the equitable mortgage should of itself have advised each party that this court had not attempted to pass upon a matter not submitted to it.

Of the authorities cited by respondent (Brief fo. 33) II Enc. Pl. and Pr. 381 holds in terms, "The principle is sharply limited to "decisions on a prior appeal on points necessary to a determination "of the cause. On matters not essential, or questions incidental or "not considered, the court is not conclusively bound on the second "appeal." Followed by the passage he there cites, wherein it relies solely upon the second case he cites, viz: Adams *vs.* Fisher 75 Tex. 657. But neither authority is in point.

In the case cited, upon the first appeal the supreme court did fully consider and decide each of the two questions, touching the merits, which were directly presented by the record and fully argued by both counsel and held against the appellant on both, but upon a matter of minor importance not going to the merits there was a reversal in their favor. The second appeal squarely presented
164 the two identical points and the appellants were held concluded not merely on the ground of *res adjudicata* but in that the former decision was entirely correct.

In asserting (fo. 30 Brief) that the present question was raised below and upon the former brief, they mistake either the point or the fact. My former briefs are on file here and consider only the matter of pleading with that of practice, viz: That under the complaint, and after planting themselves at the trial squarely upon the formal mortgages, refusing all other relief, upon appeal they could not shift their ground. (Former Brief p. 15–16 Reply Brief pp. 1–4.) In the trial court my position was the same. In neither did I argue or submit any matter of defense upon the merits nor any matter of general defense. No error in the trial court touching this matter existed. Hence appellants could not assign upon it in this court, therefore they cannot be precluded on this appeal.

Smith *vs.* Borgenschultz, (Ky.) 20 S. W. R. 390–'1.

II.

The supplementary answer (and the evidence offered at the hearing but excluded) are sufficient to have required the trial court to consider and decide upon them. His refusal is error.

At page 12 (fo. 34) of this brief, respondent protests against any consideration of such error. In this he is consistent. Throughout the trial and former appeal he stood upon his mortgages—yet this court did determine the matter of pleading. Under cover thereof he succeeded below in preventing a hearing and obtaining an *ex parte* judgment. He now demands its affirmance in that, because of his election we are precluded from setting up his waiver of the lien that judgment forecloses. His consistency takes another step.

At the trial below he said—"Though the contract was fair and complete yet under its antecedent subject-matter I demand three thousand dollars more than that contract allows." In refusing the offered relief of every dollar owing him he said—"I insist upon
165 the opposite recovery since it is so much larger—therefore the offer is refused." In this court he said—"The contract moneys have no charm to loose my grasp upon the pound of flesh. Be my decree affirmed." But now his cry—"My shekels; Oh! my shekels; forget the drops of blood. Absolve the forfeit. Endanger not my shekels. By the contract they are mine."

The courts recognize and enforce the economic law that capital cannot always require its employer to carry all the risks incident to its use. Yet here a decision is demanded which shall saddle upon the user all the risk, not indeed of the use of the money, but consequent upon respondent's unjustifiable insistence upon the extra thousands. He said to the user "I am certain that I can force you "to pay me the thousands beyond our contract. But if I fail in this "I shall be no loser. Time enough then for me to accept your offer "of my entire just dues. Should you, meantime, withdraw it I "shall force that sum at least, from you." He now expects this court to justify his position.

Of his cited cases *Re* Van Norman lends small aid. That was a race between creditors. Lapp & Co. got ahead and levied upon the debtor's assets. Thereupon the debtors assigned under the new, unconstructed insolvency statute, (see 33 Minn. 530) and the assignee demanded the said property. The plaintiffs plead fraud in the assignment. Succeeding upon that plea in the Federal court, they received the proceeds at the sale. A mere race for priority and that along wholly legal lines. The levying officer being held in trover, they paid the entire value of the property taken—then prayed to participate in the distribution, which this court allowed. They at no time demanded a penny over their admitted dues, nor did they decline any offer or opportunity of settlement nor refuse a proffered judgment. Marshall *vs.* Gilman (52 Minn. 97) merely holds that one, who by his delay or counter-election, has wholly lost a right to rescind a contract, by then vainly seeking to rescind, does not bar his remedy for damages for the fraud in procuring the contract. It is held as the reason, that there was no inconsistency between
166 the two proceedings—each was predicated upon the existence of the contract, and the fraud upon the plaintiff. The N. Y. case is practically identical as to this point, with the Marshall case.

Bank *vs.* Bank 57 Kan. 111, similar in most respects to the Van Norman case, differs in that the attachment was levied after the execution and delivery of the mortgage securing the Ill. bank's demand, it knowing of such delivery. Standing upon its claim that the mortgage was void, it obtained judgment on the trial, and thereby obtained the entire proceeds of the mortgaged property, excluding the other creditors secured by the mortgage. But on appeal this was reversed. Thereafter it sought its *pro rata* share, but was held bound by its waiver and election. The court held the case not to be within the exception covering suits for impossible remedies.

Also that the two remedies were inconsistent. This action was brought by the Emporia bank to foreclose the mortgage, making the Illinois bank and other levying creditors defendants. These two cases are not in conflict. In the former Lapp held a lien under his attachment. The subsequent assignment gave him no other lien, at least until he filed his claims. His only right thereunder was a potential one, as distributee conditional upon his filing a release. When he brought suit he had no election of rights or remedies. Under the insolvency statute the assignment cut out his lien. Thereupon his only rights were to take judgment on his claims or file it in the assignment proceeding. But these are entirely consistent. Hence, he never had an election of rights or remedies. His vain quest in seeking to enforce a non-existing lien never brought an opportunity to obtain any relief; nor at any stage could the court adjudicate upon his real right. But in the Kansas case, when the Illinois bank attached, the mortgage lien existed. That bank then had an election, viz: To take under the mortgage or resort to a legal seizure. But the mortgage being held valid, it was prior to the lien by levy, leaving nothing of value upon which that lien could operate. While the quest was as vain as that in *Re* Van Norman, yet the bank had elected and in the course of the litigation the court
167 could adjudicate upon the right and remedy last asserted. It is to be noticed that the election was made in the same suit in which it was adjudged to bar the relief last sought.

It was held upon the former appeal and is now *res adjudicata*, that the complaint is broad enough to warrant a foreclosure of the equitable mortgage thereunder. Therefore, it is also *res adjudicata* that respondent might, at the former trial, have demanded and obtained that relief. The court, on that trial, could have passed upon that right. Had defendants not appealed the judgment then entered would have barred such foreclosure. For the purpose of depriving appellants of a hearing upon their pivotal defense this court will not, by a judicial fiat, place them upon ground not only never taken in fact or intent but wholly foreign in substance, scope and object to that they did take and upon which only, on that appeal, they sought and obtained a decision.

Two classes of fact, embraced within the matter of election of remedies, give rise to two rules determining when such election becomes final and conclusive. In one class a new right springs into existence upon the initial act. A principal may either ratify or disaffirm the unauthorized contract of his agent. If the former he may hold the other contracting party under the contract. As to him the existence of the contract depends upon his election. Or a party may waive a tort and sue upon contract. Here, too, the contract arises by virtue of his election. In all cases of this class the opposite party is entitled to know at the outset upon which ground he is to be met. Hence the cases all agree in holding that the plaintiff elects and is bound thereby upon bringing an action upon either of the inconsistent theories. And that it matters not whether he recover or not. Certain critics of Nield *vs.* Burton, 49 Mich., 53 seem to have overlooked this distinction and ground. Being en-

titled to know at the outset in what relation he is to be held, the defendant rightfully treats the mere bringing of an action as a conclusive election to stand upon the ground therein set forth.

168 But in the other class of cases no new right arises. The party merely moves along one of two or more alternative lines of procedure based upon rights already existing or believed to exist. But that the differing rights and consequent remedies are inconsistent all could be followed, and no election could arise. It is only by following one that the other can be barred, and that upon principles, underlying the doctrine of *res adjudicata*. Every litigant is entitled to an opportunity to be heard upon his demand or defense and to present his asserted right of action or defense for consideration and determination by the court. But he can have but one "day in court." If, having the opportunity to present and be heard upon his entire claim or defense, he chooses to present but a portion of it, he is as fully bound by the decision as he otherwise could have been. He may not shift his cause of action, nor present his defenses piecemeal. In either case, at any time before final judgment he may petition for leave to amend so as to present his entire claim. But if he delay until the court has finally passed upon his contention he is forever bound. The judgment is *res judicata*. In this case respondent might at any time before the former judgment on appeal have dropped his claim upon the formal mortgages and have demanded and received appropriate relief upon the contract. In Jones *vs.* Burgess, Ala. 19 So. R. at p. 856 that court by Haraldson, J., says: "There is a recognized and well-established principle in the "administration of the doctrine of election of remedies, which seems "to prove beyond controversy that merely bringing a suit, without "pressing it to final judgment, cannot determine the right to an "election." Citing Leinkauff *vs.* Forcheimer 87 Ala. 258, 6, So. R. 149, the court says that in that case the claimant persisted in his suit and attachment unto judgment in the trial court and then to final decision on appeal—hence was justly held bound thereby.

In Bolton Mines Co. *vs.* Stokes 82 Md. 50, 33 At. R. 491 that court, citing its earlier decisions, says: "The law is adverse to multiply-"ing suits, and if a party has a choice between two actions upon the "same demand and he selects one which is finally decided by a "competent court, either for or against him, as a general rule

169 "he will not be permitted to resort to the other." "The ob-"vious principle which underlies this class of cases must "therefore be, that where a party has definitely selected his form of "action, and has pressed it to final decision and whether that judg-"ment be for or against him is wholly immaterial, he shall not be "at liberty to again vex the defendent. When the remedies are "alternative and not cumulative his choice of one and pursuant of "it to judgment will exclude the other, and having thus repudiated "the latter he cannot afterwards change his position and adopt the "remedy he had repudiated."

In White *vs.* White 68 Vt. 161, 34 At. R. 426 that court says: "And generally failure to obtain satisfaction by the remedy elected "gives no right to resort to the other."

In Ward *vs.* Green, 88 Tex. 177, 30 S. W. 864, Gray, the equitable owner of an undivided half of certain lands, having joined the owner of the other half (who held the title to all) in a mortgage, conveyed his interest to Ward, who, in the deed assumed and covenanted to pay half the mortgage debt. In an action wherein both mortgagors and Ward were defendants, but not counting on the above covenant, nor demanding any personal judgment against Ward, there was judgment of foreclosure, and against both mortgagors for any deficiency. Thereafter suit was brought to recover from Gray as mortgagor and Ward on his covenant, a large deficiency, the other mortgagee being insolvent and the former judgment against Gray void. Held barred by the former election and suit. See Main Brief p. 6. The court farther said: "Neither does "the invalidity of the personal judgment against Gray in the former "suit affect the question. It is not the judgment against Gray that "estopps the plaintiff, but the proceeding to foreclose against Ward." "Whether or not valid as against Gray the judgment proves the "election of remedies."

In Texas a deed reserving a lien for the price does not *pais title*. Upon default the vendor may elect between a suit for possession and one to for-close the lien. In Stone Cattle Co., *vs.* Boon 73 Tex. 170 551 (11 S. W. 547), it is held that before trial such vendor, by amendment may change from an action to foreclose the lien to one for possession.

In Hensley *vs.* Sheets 46 N. E. R. 94 it is held that by an election to press to final decision a bill or motion to review a judgment the right of appeal therefore is waived. The court says: "A party may "preclude himself from appeal by an election of remedies." See also Campbell *vs.* Wiggins 85 Tex. 451–22 S. W. 5. In Moore *vs.* Sanford, 151 Mass. 287 (24 N. E. 323) the plaintiffs had filed a petition under a statute of eminent domain for the damages sustained by a taking of their land. Such action inferentially admitted the validity of that statute. But before any hearing thereon they brought suit to declare the taking invalid in that the statute was unconstitutional. Held, not barred by the mere filing of that petition, the court, A. Devens, J., says the case is not within that class of cases wherein the mere "selection of one remedy necessarily implies that any other "remedy or any ground thereof is waived." But very strongly intimates that had the plaintiffs pressed their former proceeding to judgment they would have been bound by their election "for" says the court, "the plaintiff ought not to be allowed to experiment what "damages they might obtain before testing the constitutionality of "the act."

In Brunswick Co. *vs.* Dart 93 Ga. 747 (20 S. E. 613) held, Lumpkin, J. writing the opinion, that though the statute gives attorneys' fees as damages in specified actions, they cannot be allowed where the party has elected to sue in specific performance and has pressed such suit to final judgment. The reason for excepting cases where only an impossible remedy is sought from the general rule is that in such cases the party never had a "day in court" since therein it was not possible for the court to consider or determine his contro-

versy. In Strong *vs.* Strong 102 N. Y. 69, cited by respondent, that court states this as the reason for its decision—"The allegations and "proceedings show affirmatively that he" the surrogate before whom were the proceedings relied on to show an election, "had no author- "ity to pass upon the merits of the application." See other cases, my Main Brief p. 9. The party really took no position—pre-
171 sented nothing to the court—hence did not elect. A mere intent to elect is of no effect.

Hinchman *vs.* R'y Co. 14 Wash. 349, 44 P. R. 867, holds that where a vendor having sold property conditionally, the title not to pass until full payment, joins with other creditors in taking general security by mortgage covering that and other property, he cannot in an action wherein a foreclosure of that mortgage is sought also claim that portion of the property so sold as owner. He elected to waive and did waive his title as owner.

"A party who has the option of making his defense either at law "or in equity is bound by his choice though defeated." Carlyle *vs.* Long 5 Litt. (R'y) 168.

Suit, pressed to judgment, against an agent, knowing he was an agent and who was his principal, is an election not to sue the principal, though the judgment be worthless and the agent insolvent.

Fowler *vs.* Bank, 113 N. Y. 450 (21 N. E. 172).
Bigelow Estoppel (5*ed*) p. 124.

So too whatever the judgment against the agent.
2 L. R. A. p. 812 note.

Both in title and spirit, the rule of election of remedies applies where the selection was made in the same action in which occurs the later effort to resort to an alternative right or remedy. Inconsistency in the demand and the duty to present the actual demand relied upon—that a party is entitled to but one day in court in a single controversy underlie the rule. Bishop states it,—"Election "is the right of choice between two or more steps or things, by a "person not entitled to all; or it is the choice itself." Contracts sec. 781, also 6 Enc. Law (1st ed.) p. 247. Bigelow, thus "A party can- "not occupy inconsistent positions; and where one has had an elec- "tion between several inconsistent courses of action, he will be con- "fined to that which he first adopts." Estoppel (2nd ed. p. 503).

Pomeroy, "This doctrine involves the notion that no man
172 "can claim inconsistent rights with regard to the same sub- "ject." II Eq. Jur. sec. 395. (Is the basis of election under a will or deed, do. sec. 461 *et* S. E. G.) In 7 Enc. Pt. & Pr. 361—"Whenever the law supplies to a party two or more methods of re- "dress in a given case, based upon inconsistent theories, however "those methods may differ, either in the form or forum of procee- "dure—the party is put to his election and his choice of either is a "bar to the other."

It is the two, inconsistency, and opportunity, which determine. Both these apply as fully where all transpires in one proceeding as

though they had found expression in more than one. Bank of Enfala *vs.* Nat'l Bank of Illinois 57 Kan. 111, stated and cited from, *supra*, is precisely in point. Also Hildebrand *vs.* Tarbell, 73 N. W. 53. Also see Brunswick Co. *vs.* Dart, *supra*. In Hinchman *vs.* R'y Co. the election and waiver occurred in the bringing of the same suit in which it operated as a bar. Election is not, nor is it a result of *res judicata*. Ward *vs.* Green and Terry *vs.* Munger, *supra*. Respondent had his day in court, upon his chosen demand, wherein he might have recovered full relief, as fully as though the judgment on appeal had ordered the action dismissed upon the matter of pleading presented. His present quest is as essentially seeking his former discarded relief as though presented in a separate action.

The offer of judgment made at that trial by appellants was withdrawn prior to the submission of the case. P. B. p. 24. Respondent's counsel are in error in denying, in their affidavit, p. 9 P. B., such withdrawal. Therefore the offer, not being continual, neither authorized the subsequent attempt to obtain such judgment nor waived his election.

The two rights or liens were inconsistent—viz: (1.) In the lands covered. (2.) One a single lien, the other 4 distinct liens on different lands, all covering but a portion of those in the former. (3.) One a creature of equity, the others legal. (4.) A difference in amount of nearly $3,000. (5.) In rates of interest. (6.) In maturity.
173 (7.) The one did not the other did contain a power of sale.

The causes of action were as diverse as the liens. The remedies sought were alternative—not concurrent. In one, upon a single lien for a distinct amount, in the others upon four liens widely different in amount either severally or in the aggregate, each was exclusive of the other, and, carried into judgment, would bar the other. The only common feature, in any aspect, is in that, under the contract, a default thereon could operate a default in the mortgages. In his former brief p. 11, respondent plainly stated his position thus. "The only default that could occur would be a default in the pay- "ment of the monthly installments; and if upon such default there "should be a foreclosure it must not be for the optional payment of "$20,400 (which is not enforcible at all) but for the amount due "upon the notes and mortgages." Thus clearly repudiating the cause of action now insisted upon, while he now repudiates those then sued upon. He did not then in any manner state the facts and seeks only such relief as the court might hold him entitled to thereon—but stated his specific demand with the facts he claimed supported it—and to the end insisted upon that precise relief refusing any other. Even now he admits (p. 8, fo. 21 Present Brief) the remedies to have been alternative. He there says the contract "af- "fected all the mortgages in the same manner so that if by its oper- "ation they were merged the relief must be limited to a foreclosure "of the contract, for the amount specified therein, but if they were "not so merged the relief must be a foreclosure also of the original "mortgages for the larger amount secured by them." Since no admissible construction could make the contract merely a collateral se-

curity for but a part of the sums secured by the mortgages, I am at a loss to know the force of the above word "also."

But it is argued that respondent's asserted rights did not exist and that he but sought an impossible remedy. This argument wholly overlooks the facts: (1.) In his pursuit he might have recovered upon his real right. (2.) That he was offered a judgment which would have given him full relief, but refused it. In the Kansas Bank case *supra* the attachment was based upon the alleged
174 invalidity of the mortgage. Such basis wholly failing, the attaching creditor could not possibly obtain any relief thereby. Nevertheless in the suit to foreclose the mortgage he was afforded an opportunity to desist from his contest and receive the remedy he in fact was entitled to. Then, as here, succeeding in the trial court, he persisted in his baseless demand until judgment of reversal on appeal and although there as here the case was remanded for further proceedings, he was held bound by his election. He had had his full day in court and therein might have recovered full relief. His failure to obtain any relief was wholly due to his own act. Since this effect is the legal outcome of his intelligent choice and determination, he must be held to have intended such result. West *vs.* Platt 127 Mass. 372, 28 Enc. Law 528 note 4.

It matters not that respondent may have thought he would be able to assert his lien under the equitable mortgage in case he was finally defeated in his selected demand. In each case where a plaintiff splits his cause of action he does so intending thereafter to press the omitted portions of his demand. Nor does it matter to say he would have to give up the possible advantages of his elected right and remedy for this is equally the case in every case of election of remedies.

Having insisted upon his chosen demand until the entry of judgment on appeal, which is a final judgment upon that matter, respondent is now bound by his election. See cases cited, p. 6 Brief.

In Sullivan *vs.* Ross Estate 71 N. W. R. 634 plaintiff claimed a large balance due him on a logging contract. He knew the facts. He brought suit counting upon an oral contract which he plead controlled in the entire matter. He recovered a large judgment in the trial court, which upon appeal was reversed upon the ground that there was no oral contract in any manner affecting the matters in dispute, all of which were controlled by a written contract inconsistent with the averred oral agreement. Thereafter seeking to recover upon the written contract, he was held to be precluded by
175 his election and prosecution of his asserted claim under the oral contract. It must be noticed that at no time during the pendency of the first proceeding could the plaintiff have recovered any relief. Because of that fact upon reargument he was permitted to present his real claim, the chief justice however dissenting. Had he been offered, during the former proceeding—either a trial under the written contract or a judgment for all relief recoverable thereunder the final decision clearly would have held him bound by his election.

In Terry *vs.* Munger 121 N. Y. 161–24 N. E. R. 273, that court by

Peckham, J. says: "When it becomes necessary to choose between "inconsistent rights and remedies the election will be final and can- "not be reconsidered, even where no injury has been done by the "choice, or would result from setting it aside." This case also directly holds that the bar to the latter proceeding arises not by way of estoppel, but solely from the conclusive election.

The analogous rule of waiver also applies, "A mortgagee by com- "mencing and prosecuting an action upon the mortgage to secure a "conditional judgment for possession waives a previous entry to "foreclose."

Smith *vs.* Kelly 27 Me.
28 Ency. Law p. 558 note 3.

A mortgagee waives his mortgage rights by levying an attachment upon the mortgaged property.

Evans *vs.* Warren 122 Mass. 303.
28 Ency. Law, 555 and cases cited note 2.
Dyckman *vs.* Sevatson 39 Minn. 133.

A vendor in a conditional sale providing that title did not pass until payment of the purchase price waives his title and right to retake possession by reducing his demand for the price to judgment and levying attachment upon the property, even though the attachment was illegal.

Fuller *vs.* Eanes 108 Ala. 464, 19 So. R. 566.

Holding that though invalid, by the attachment the vendor
176 treated the property as that of the defendant "and sought "to subject it, in a manner wholly inconsistent with the re- "tention of title in himself." Citing many earlier cases.

Bishop defines waiver: "Waiver is where one in possession of any "right, whether conferred by law or contract, and of full knowledge "of the material facts, does or forbears the doing of something in- "consistent with the existence of the right or of his intention to "rely upon it; thereupon he is said to have waived it and he is pre- "cluded from claiming anything by reason of it afterward."

Bish. Contracts 87 Ed. sec. 792.

A consideration is requisite to support a waiver only where the waiver must operate, if at all, if creating a right—a contract. Here its only effect was to relinquish the right to foreclose the equitable mortgage and no consideration is necessary.

Dunn *vs.* Ward 63 Minn.

In Laird *vs.* Laird, Mich. 73 N. W. 382 a father, in consideration for his support, agreed to devise to his son all his property at death. He left a different will the son being one of the named executors, had the will allowed and filed a claim for the support. Held he waived the right to a specific performance of the agreement and elected the other procedure. The court cites and relies (in part) on Sullivan *vs.* Ross Estate 71 N. W. 634, *supra.*

It is not necessary to support a waiver by election of action that the action brought be one wherein some recovery can be had. In

Hildebrand *vs.* Tarbell, Wis. 73 N. W. 53; 57 a creditor, being one of the beneficiaries in certain transfers by way of security, having taken judgment on his demands execution whereon was returned unsatisfied, brought suit against another beneficiary to cut down the demands of the latter thereunder and to establish a *pro rata* interest in the transfers. Such action having been pending three years the plaintiff amended, changing his action to one to set those transfers aside as fraudulent. Being defeated he appealed.
177 The court held that had he first brought his action to set aside as fraudulent, he would have recovered but that he had waived that right by his election to take the other course. It also held that he had no right under the action as first brought and could not have recovered therein.

A pledgee or mortgagee waives his lien by refusing a tender of his demand.

Norton *vs.* Baxter, 41 Minn., 146.
Moore *vs.* Norman, 43 Minn., 428.
Cass *vs.* Higenbotam, 100 N. Y., 248.

This is important here. A mortgage was first a pledge. By refusing the tender, the pledgee insisted upon retaining the pledge—a wrong as to the pledgor. When a mortgage became merely a lien, the refusal still, though in less degree possibly, remained a wrong.

In Mitchell *vs.* Roberts 17 Fed. R. 780, Judge Caldwell observes: "This rule accords with justice and fair dealing. It would be a "great hardship on the debtor if the creditor had the right to refuse "to accept payment of the debt after it was due, and at the same "time retain the debtor's property or a lien on it for the debt. Ad- "vantageous sales would be prevented, collections delayed and credit "lost by the inability of the debtor to free his property. In many "cases debtors would be ruined before they could obtain relief by a "bill to redeem.—On the other hand, a creditor who refuses to re- "ceive payment of his debt cannot complain at the loss of his se- "curity for that debt, because it shall be accounted his own folly that "he refused the money when a lawful tender of it was made unto "him." Here no money was tendered. But the only relief the law recognized was offered. Claiming a large excess respondent tied the lands up by the judgment therefor. They could not be made available in any manner as means to obtain the money with which to pay the actual debt. The expense and delay of an appeal were imposed. It is farther to be noticed that from the inception of this litigation early in 1896 respondent has insisted upon judgment neither authorized by his contracts nor allowed by law, thus con-
178 stantly keeping all the lands tied up, thereby as well as through the onerous litigation preventing appellants from redeeming. Every reason supporting the rule of waiver just cited exists here and in stronger form. Not by his mere refusal (for that might at any time have been withdrawn) but by that coupled with his insistence to final judgment on appeal, he has waived the lien he now seeks to enforce.

III.

Respondent now seeks to support the exclusion of the supplementary answer and the proofs offered at the hearing upon the ground that they came too late. That appellants should have offered such answer at the former trial. He forgets that it could be no defense to the only demand he then pressed. He then expressly refused the judgment they offered and now seeks to cast the onus upon them in that they did not at once withdraw the offer and seek to defeat the proffered relief. But he did not object upon this ground to the filing of that answer. In the affidavit of his counsel, p. 9, P. B. (which, with my affidavit and the files, was all that was submitted to, or considered by, the court. P. B. fo. 25), he explicitly states his only objection, viz., that we were concluded by the former decision here. All was *res adjudicata*. Also, at the hearing below, he plainly stated the grounds of his objection to the offered proofs (P. B. fos. 60 to 63), not one whereof included the point now attempted to be raised. At fo. 63 he again stated his objection thus: "That the proposed supplementary answer did not set up facts constituting a defense and that the matters set forth therein were *res adjudicata*." Resting, then, upon these objections, he waived that he now seeks to interject and is estopped to raise it. But there is nothing in it. The matter of defense had no existence until the entry of judgment on appeal (August 15, 1898, P. B. p. 13). Besides, it did not appear prior to his service of the notice for amended findings and judgment, that respondent intended to claim such judgment, thereupon we promptly sought to serve the supplementary answer, and served the notice therefor, which, with the affidavit (fos. 3 and 6 to 18, P. B.) explicitly stated, the precise nature and time of origin of the de-
179 fense, and the reasons why it was not offered immdediately upon the remand no one whereof was questioned. Plainly the trial court considered itself bound by the former decision and mandate and passed upon no matter of objection not then raised by counsel.

The statute providing that "a defendant may be allowed on motion, to make a supplementary answer, etc.," (sec. 5270 St. 1894) is imperative. "When the party offering to serve and file such "supplementary pleading makes the proper showing, and is guilty "of no unreasonable laches, it is not a discretionary matter, but it is "the duty of the court to allow it." Mansten *vs.* Berryhill 63 Minn. 1, 65 N. W. 89. Voak *vs.* Investment Co. 51 Minn. 455.

The matters alleged in sec. 3, supplementary answer, are material to show that, when he made his election, he knew not only every fact, but even the principles and application of the law, pertinent thereto. Sec. 3, though in form a conclusion of law, yet, connected with the preceding averments of fact, plainly apprised the plaintiff of the precise nature of the defense relied upon and of the grounds thereof. Sec. 4 is a formal averment of claim under the Federal Constitution and a protest against the attempted arbitrary taking of the lands while refusing a hearing—a taking without due process of law.

This rejected answer and record evidence further show the facts touching this litigation, viz: Respondent first verified his complaint alleging himself to be the owner of all the land in the contract under the deed to him therein described—demanding instant possession of all thereof with large damages for its retention. The court held the deed and contract to amount to an equitable mortgage. Thereupon he sought to file an amended complaint, also verified by himself, alleging respondent to be its owner but that they wrongfully withheld its possession from him and praying for a sale thereof without right of redemption (P. B. p. 38). Failing in that attempt he procured a dismissal of that action without costs and instituted the present suit with its demand for $3,000 over the entire
180 amount owing to him, and thereon forced defendant to an appeal to this court in order to be relieved from the wrongful judgment therefor. Being there again thwarted, he plays still another sleeve card thereby debarring appellants from any hearing and from all right to be heard, thus driving them either to unconditional surrender or to a second appeal, and now he seeks the establishment of his gag law in this court. I submit these facts only to clearly show a dominant purpose, operative throughout this entire litigation, far removed from the desire to obtain his rights, legal or moral.

Appellants ask no final judgment here but only that there may be a fair and open trial as to the existence and effect of the matters alleged in defense.

We therefore pray the reversal of the judgment appealed from the vacation of the sale thereunder, with directions to the trial court to permit the service and filing of the supplementary answer. All which is respectfully submitted.

181 11859.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

DANIEL S. PIPER, Respondent,
vs.
JOSEPH A. SAWYER ET AL., Defendants; JOSEPH A. Sawyer and Nellie A. Sawyer, Appellants. } No. 124. Opinion.

This is the second appeal in this case. See 73 Minn. 332, 76 N. W. 57. The facts, about which there is no controversy, are fully and clearly set out in the opinion on the former appeal, and need not be repeated at length here. To a proper understanding of this opinion the principal facts only need be stated.

At a date long prior to the commencement of this action, the plaintiff became the owner of four certain mortgages executed by defendants Sawyer and wife upon real property owned by them, and, to adjust the amount due thereon, and provide for the payment thereof, entered into an agreement with defendants in which the sum of $20,400 was fixed as the total amount due. Terms of pay-

ment thereof were agreed upon, and it was also agreed that defendants should convey the property to plaintiff, and plaintiff should in turn reconvey to defendant Mrs. Sawyer; the deed to her to be delivered to and held by defendant Woodman until Sawyer and wife should pay such indebtedness. The deeds were duly executed and delivered accordingly. Defendants failed to pay the indebt-
182 edness at the time and as required by the terms of the agreement, and plaintiff, acting on the theory that the new agreement operated only as a modification of the contract between the parties as made up by the mortgages, and that they were not merged therein, brought this action, and asked for the foreclosure of the four mortgages. The court below on the first trial held in harmony with this theory, and ordered judgment of foreclosure as to the four mortgages, from which judgment the former appeal was taken. It was held by this court on that appeal that this special agreement constituted an equitable mortgage, in which the four prior mortgages became merged. The judgment was reversed, and the cause remanded, with directions to the court below to amend its findings of fact and conclusions of law, ascertain the amount due on the equitable mortgage, and direct its foreclosure. The court below complied with this mandate, and defendants again appeal.

At the time of plaintiff's application to the court below for the amended findings, the defendants applied for leave to file a supplemental answer, setting up as a defense—to state it in substance and briefly—that, because plaintiff had brought his action to foreclose the original mortgages, and had refused defendants' offer to allow judgment of foreclosure as to the equitable mortgage, his remedy under the latter became lost, and he thereby estopped himself from asserting any rights thereunder. The court below denied this application, and this refusal is assigned as error. Although there are nine separate assignments of error, they all go to this one question. All the facts with reference to the four mortgages and the equitable mortgage are stated in the complaint, and are undisputed.

The identical question presented by the proposed supplemental answer was presented and argued to this court on the former appeal, and decided adversely to appellants, and is, therefore, *res*
183 *adjudicata*. That decision became the law of the case, and the question cannot be reconsidered on this appeal. Johnson *v.* N. W. Telephone Ex. Co., 54 Minn. 37, 55 N. W., 829. And, besides, the cause was remanded to the district court on the former appeal with directions to award judgment of foreclosure as to the equitable mortgage, and that court had no alternative but to comply with that mandate. "Where a judgment is reversed and remanded with specific directions, the court below has no discretion in the premises, but must pursue the mandate of the appellate court." 13 Enc. Pl. & Pr., 846. For these reasons the judgment appealed from must be affirmed.

But we may remark, in passing, that the facts set up in the proposed answer do not constitute a defense, and, conceding authority in the court below to permit it to be interposed, the order rejecting it was proper for that reason. The doctrine of election of remedies

has no application to the facts of this case. Plaintiff did not possess two inconsistent remedies for the enforcement of his rights. He possessed an incumbrance against defendants' property to the amount of $20,400 or more, with but one remedy to enforce the security, which was by foreclosure of the incumbrance, whether evidenced by the original mortgages or by the substituted equitable mortgage. He did not waive his rights under the equitable mortgage by asking in his complaint—which set out all the facts, both with the reference to the original and equitable mortgage—that the original mortgages be foreclosed. The plaintiff asked for the wrong relief but the court was not precluded from granting him his proper relief. G. S. 1894, § 5413.

Judgment affirmed.

184 [Endorsed:] No. 11859. State of Minnesota, supreme court. Daniel S. Piper, respondent *vs.* Joseph A. Sawyer *et al.* defendants Joseph A. Sawyer *et al.* appellants. Opinion and syllabus filed November 29 1899. D. F. Reese, clerk.

185 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

DANIEL S. PIPER, Respondent,
vs.
JOSEPH A. SAWYER ET AL., Defendants, JOSEPH A. SAWYER and NELLIE A. SAWYER, Appellants. } No. 124.

Pursuant to an order of court duly made and entered in this cause, on the fifteenth day of December A. D. 1899.

It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the fifth judicial district, sitting within and for the county of Steele, be and the same hereby is in all things affirmed and it is further determined and adjudged that the respondent above named, do have and recover of said Joseph A. Sawyer and Nellie A. Sawyer, appellants herein the sum and amount of seventy-one and $\frac{40}{100}$ dollars ($71.40) costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this fifteenth day of December A. D. 1899.

By the court.

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees, for making return	22.15
Printer's fees	14.00
Clerk's fees, supreme court	10.00
Filing mandate	
Affidavits and acknowledgments	.25
Postage	
	$71.40

186 STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and seal of said supreme court at the capitol, in the city of St. Paul, this fifteenth day of December A. D. 1899.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE, *Clerk.*

[Endorsed:] 11859. State of Minnesota, supreme court Transcript of judgment. Filed December 15, A. D. 1899. D. F. Reese, clerk.

187 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

DANIEL S. PIPER, Respondent,
vs.
Jos. A. SAWYER ET AL., Defendants;
Jos. A. Sawyer and Nellie A. Sawyer, Appellants.

No. 124. Appeal from District Court, Fifth Judicial District, County of Steele.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1899, upon the return to the appeal herein.

Now after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be and the same hereby is, in all things affirmed and that the respondent above named have judgment accordingly.

Entered December 15 A. D. 1899.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

188 [Endorsed:] No. 11859. State of Minnesota, supreme court. Copy of order for judgment. Filed December 15 A. D. 1899. D. F. Reese, clerk. Entered on page —.

189 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1899.

THURSDAY MORNING, 9.30 O'CLOCK,
November 23, *A. D.* 1899.

Court convened pursuant to adjournment. All the justices being present.

DANIEL S. PIPER, Respondent,
vs.
Jos. A. SAWYER ET AL., Appellants. } Cal. No., 124; Reg. No., 11859.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record

[Seal of the Supreme Court. State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

190 [Endorsed:] 11859. State of Minnesota, supreme court. Copy of minutes of argument. Filed December 15 A. D. 1899 D. F. Reese clerk.

191 [Endorsed:] No. 11859. State of Minnesota, supreme court. Daniel S. Piper respondent against Jos. A. Sawyer *et al.*, appellants. Judgment-roll. Filed December 15 1899 D. F. Reese clerk.

192 STATE OF MINNESOTA, } ss:
Supreme Court, }

DANIEL S. PIPER, Plaintiff and Respondent,
vs.
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants; Joseph A. Sawyer and Nellie A. Sawyer, Appellants.

Petition for a Writ of Error.

To the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota:

Now come the above-named Joseph A. Sawyer and Nellie A. Sawyer, by their attorney, J. A. Sawyer, and complain that in the records and proceedings and also in the rendition of the judgment in a suit between Daniel S. Piper, plaintiff and Joseph A. Sawyer and Nellie A. Sawyer and L. C. Woodman, defendants and appellants in the supreme court of said State of Minnesota, (said court being the highest court in law or equity in said State of Minnesota in which a decree could be had in said cause,), notwithstanding it

was contended and asserted by said defendants that the orders and judgment of the trial court in said cause, from which said judgment the appeal in said suit to said supreme court of the State of Minnesota, was taken and was then and there pending, had, and did prevent these plaintiffs in error, who then were and now are citizens of the United States of America, and of said State of Minnesota, from interposing and from having considered and determined by said court, their defense to and in said suit, and that said trial court had in said suit refuse- to said plaintiffs in error all opportunity to be heard upon their said defense, and did deprive these plaintiffs in error of their lands and property without due process of law, and did refuse to them the equal protection of the laws, and that said judgment of said supreme court of Minnesota did deny to, and refuse these plaintiffs in error any and all hearing, and all opportunity to be heard, in said suit or otherwise, upon their said defense, and did prevent them from *from* presenting the same for the consideration and determination of said supreme court of Minnesota, and did deprive them of their lands and property without due process of law, and did refuse to them the equal protection of the laws, contrary to the provisions of sec. 1 of art. XIV of the amendments to the Constitution of the United States of America
193 and that said judgment operated as such violation, and was and is in direct contravention, and in direct and neccessary violation of said sec. 1 of art. XIV of the amendments to the Constistution of the United States, yet and notwithstanding their said contention, a final judgment was in said suit entered and rendered against said defendants, these plaintiffs in error, in said supreme court of Minnesota, on the 15th day of December A. D. 1899, wherein it was adjudged that the decision of said supreme court of Minnesota in said cause upon a former appeal therein taken by these plaintiffs in error, and wherein the judgment of said trial court in said cause foreclosing each of the four formal mortgages set forth in the complaint therein, and adjudging that the equitable mortgage set up in said complaint and the contract and deeds evidencing said equitable mortgage were *functus officio* and of no force, was reversed and said suit remanded—that said judgment was *res adjudicata* as to these plaintiffs in error and prevented them from setting up or presenting their said defense, viz.—that by insist*t*ing upon a foreclosure of said formal mortgages and insisting upon the rendering and entry therein of a judgment that said contract and deeds and the equitable mortgage evidenced thereby were terminated and of no force, upon a complaint praying solely for that relief, and by expressly, and in open court at the trial below of said cause, refusing to accept the offer of judgment *t*hen, in open court, made by said defendants to said plaintiff of immediate and unopposed entry of judgment therein foreclosing said equitable mortgage for the sum then due and unpaid, principal and interest, thereon, and by adhering and d*me*anding said judgment of foreclosure of said four formal mortgages and for the entire sum, principal and interest and attorneys' fees therein specified, said sum being greater by more tha*t* two thousand dollars than the amount due upon said equitable

mortgage, and by demanding in said supreme court of Minnesota that said judgment of foreclosure of all said formal mortgages with all said excessive sums and amounts, and by insisting upon said remedy only and repudiating all other and different relief until after final judgment in said supreme court of Minnesota reversing said judgment and determining that each and all of said four formal mortgages were anf had been merged in said equitable mortgage when said contract was entered into and were no *no* longer of any force or effect, the said plaintiff, this defendant in error had conclusively elected his remedy and cause of action and had there-
194 by estopped himself from asserting, in direct contradiction to his said election of remedies, and in contravention thereof, that said formal mortgages were extinct and said equitable mortgage in full life and force. And it was further held, adjudged and decreed in and by said judgment of said supreme court of Minnesota, so entered in said suit on said 15th day of December A. D. 1899 that the orders and judgment of said trial court in said suit, made after the first remand thereof, refusing to allow said defendants to plead their said defense therein, and refusing to allow them to present any evidence in support thereof, and in refusing to allow any trial whatever in said cause after said remand thereof, and in making and filing therein further findings of fact therein without taking any evidence therein, and thereby refusing to allow said defendants to present or be heard upon their said defense therein, and in wholly refusing in any manner to consider said defense or to pass upon its validity in any manner whatsoever, did not operate in any manner to deprive said defendants of any right secured to them by said XIVth amendment and did not deprive them of their property without due process of law and did not deny to them the equal protection of the laws. And it was further determined, decided and directed in and by the said judgment of Dec. 15th 1899 in said supreme court that said judgment, so entered upon said denial to said defendants of all heraing upon their said defense was a valid judgment, and that the same should be promptly enforced and that the sale of all said lands of said defendants thereunder was a valid sale, transferring to said plaintiff, Daniel S. Piper, who was the purchaser thereat, the full legal title to all said lands, and that said sale and the expiration of redemption therefrom did and would pass to said Piper the full title to all lands and the right to the immediate possession of all thereof, and that thereby said defendants were not deprived of any rights under said XIVth amendment and were not deprived of any property save only by due process of law. All of which fully appears on the face of the records, pleadings, assignments of error, briefs, proceedings of said supreme court in said cause, and is contrary to art. XIV of the amendments to the Constitution of the United States.

Wherefore said Joseph A. Sawyer and Nellie A. Sawyer, appellants aforesaid, pray for the allowance of a writ of error, and for such other process as mau cuase the said decision of said su-
195 preme court of Minnesota to be reviewed and corrected by the Supreme Court of the United States.

Dated at St. Paul, Minnesota, this 30th day of November A. D. 1901.

J. A. SAWYER,
Attorney for Defendants, Owatonna, Minnesota.

STATE OF MINNESOTA, *Supreme Court,* } ss:

On reading and filing the above petition for a writ of error to the Supreme Court of the United States, and on motion of J. A. Sawyer Esq. of counsel for said defendants and petitioners in error, it is ordered: That the said petition be, and the same is hereby granted, and that a writ of error issue forthwith as prayed for in said petition.

Dated at St. Paul, Minnesota, this 30th day of November, A. D. 1901.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

196 [Endorsed:] Petition for a writ of error.

197 *Bond in the Supreme Court of the United States of America.*

JOSEPH A. SAWYER and NELLIE A. SAWYER, Plaintiffs in Error,
against
DANIEL S. PIPER, Defendant in Error.

Know all men by these presents, that we, Joseph A. Sawyer and Nellie A. Sawyer, plaintiffs in error, as principals, and Laurence C. Woodman and M. H. Abbott, Fred L. Davies and N. T. Davies as sureties, all being citizens and freeholders of and in the counties of Steele and Freeborn and State of Minnesota, are held and firmly bound unto Daniel S. Piper, the respondent above named, his heirs, executors, administrators and assigns, in the full sum and amount of five hundred dollars ($500.00), to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated on this 27th day of November A. D. 1901.

Whereas lately, at a session of the supreme court of the State of Minnesota, in a suit pending in said court between said Daniel S. Piper as plaintiff and said Joseph A. Sawyer and Nellie A. Sawyer, as defendants, a fi*b*al judgment was rendered against said defendants, and the said defendants obtained a writ of error from the Supreme Court of the United States and filed a copy thereof in the clerk's office of said court, to reverse said judgment in the aforesaid suit, and a citation to said Daniel S. Piper citing and admonishing him to be and appear before the Supreme Court of the United States at a term thereof to be begun and holden at Washington D. C. on Monday the 30th day of December A. D. 1901: Now the condition of the above bond is such, with the obligation therein contained, that if the said Joseph A. Sawyer and Nellie A. Sawyer shall prose-

cute their said writ of error and answer all costs and damages and fully pay to said Daniel S. Piper his heirs, executors, administrators and assigns the full amount of such costs herein as may be hereafter entered against them, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

JOSEPH A. SAWYER. [SEAL.]
NELLIE A. SAWYER. [SEAL.]
L. C. WOODMAN. [SEAL.]
M. H. ABBOTT. [SEAL.]
FRED L. DAVIES. [SEAL.]
N. T. DAVIES. [SEAL.]

In presence of
A. L. SPERRY,
PARK SAWYER,
As to Joseph A. Sawyer.
" Nellie A. Sawyer.
" M. H. Abbott.
" L. C. Woodman.

C. S. SWENSON,
PAUL BEAN,
As to Fred L. Davies.
" N. T. Davies.

198 STATE OF MINNESOTA, } ss:
County of Steele, }

On this 29th day of November A. D. 1901, before me, a notary public in and for said Steele county, personally appeared the above-named Joseph A. Sawyer, and Nellie A. Sawyer, and Laurence C. Woodman and M. H. Abbott to me well and personally known to be the same persons described in and who executed the above and foregoing instrument and bond, and they each acknowledged the execution thereof to be their free act and deed.

A. L. SPERRY,
Notary Public, Steele County, Minnesota.

[Notarial Seal, Steele Co., Minn.]

STATE OF MINNESOTA, } ss:
County of Steele, }

On this 29th day of November A. D. 1901, before me, a notary public in and for said Steele county, personally appeared Laurence C. Woodman, to me known to be the surities upon the above bond, who, *each* being duly sworn, did say that he is one of such sureties, and is a resident and freeholder in said Steele county and worth the sum of five hundred dollars above all debts and liabilities and exclusive of his exemptions, and *each thereof* did say that he is worth more than five times the amount of said bond over and above all debts, liabilities and all exemptions.

L. C. WOODMAN.

Subscribed and sworn to before me this 29th day of November, A. D. 1901.

A. L. SPERRY,
Notary Public, Steele County, Minn.

[Notarial Seal, Steele County, Minn.]

199 STATE OF MINNESOTA, } ss:
County of Steele, }

On this 29th day of November A. D. 1901 personally appeared M. H. Abbott who being first by me duly sworn did say that she is a resident of said Steele county and is worth the sum of five hundred dollars over and above all debts and exclusive of all property exempt from execution, and that she is one of the sureties within named.

(Signed) M. H. ABBOTT.

Subscribed and sworn to before me this 29th day of November A. D. 1901.

A. L. SPERRY,
Notary Public, Steele County, Minn.

[Notarial Seal, Steele County, Minn.]

STATE OF MINNESOTA, } ss:
County of Freeborn, }

On this 29th day of November A. D. 1901, before me, a notary public in and for said county, personally appeared Fred L. Davies & N. T. Davies to me personally known to be the same persons described in, and who executed the within bond as sureties and acknowledged the execution thereof to be their free act and deed.

C. S. SWENSON,
Notary Public, Freeborn County, Minnesota.

[Notarial Seal, Freeborn County, Minn.]

STATE OF MINNESOTA, } ss:
County of Freeborn, }

Fred L. Davies and N. T. Davies each being first duly sworn did say that they are sureties on the within bond and worth the sum of five hundred dollars, specified in the within bond, over and above all debts and liabilities and exclusive of all property exempt from execution and that each is worth more that fourfold said sum, exclusive of all debts and exemptions, and that they are residents and freeholders in the county of Freeborn in said State of Minnesota.

(Signed) FRED L. DAVIES.
N. T. DAVIES.

Subscribed and sworn to before me on this 29th day of November A. D. 1901.

C. S. SWENSON,
Notary Public, Freeborn County, Minnesota.

[Notarial Seal, Freeborn County, Minn.]

200 [Endorsed:] State of Minnesota Supreme Court of the United States —judicial district. Joseph A. Sawyer & *W.* A. Sawyer, plaintiffs in error, *vs.* Daniel S. Piper, defendant in error. Copy of bond. I hereby approve of this bond and the sureties therein named. Chas. M. Start, chief justice. Dated Nov. 30, 1901. J. A. Sawyer, attorney for plaintiffs in error, Owatonna, Minn.

201 In the Supreme Court of the United States, *ss:*

JOSEPH A. SAWYER and NELLIE A. SAWYER, Plaintiffs in Error,
against
DANIEL S. PIPER, Defendant in Error.

Assignment of Errors.

(1.)

It was error in the trial court, to refuse leave to file the supplementary answer prayed for by plaintiffs in error, and error in the State supreme court to affirm the judgment entered in said cause upon said refusal by said trial court.

(2.)

It was error in the trial court to reject the evidence offered by plaintiffs in error to substantiat*e* their said defense in said cause, and error in said State supreme court to affirm the judgment based upon such refusal.

(3.)

It was error in said trial court to refuse the demand for a trial, made therein by plaintiffs in error, and to order judgment against them upon amended findings made solely upon the evidence submitted at the former trial, when the defense asserted after the remand, did not exist and was not pleaded nor offered to be proven, and error in said State supreme court to affirm the judgment so entered.

(4.)

It was error in said State supreme court to hold plaintiffs in error bound by the former judgment therein upon the first appeal, *res adjudicata.*

(5.)

It was error in said State supreme court to remand said cause upon said former appeal with directions to the trial court to amend its findings of fact, upon the evidence submitted at the former trial, and thereon to order judgment in favor of this defendant in error for the foreclosure of the equitable mortgage.

(6.)

It was error in said State supreme court to hold these plaintiffs in error bound by such directions in said decision upon said former

appeal and to refuse to allow them to be heard upon, and in refusing to consider their said defense based upon the controlling election by defendant in error to rely solely upon his formal mortgages, and to hold the contract and deeds of no force, such election
202 having been persisted in and relied upon until after the entry of final judgment in said State supreme court holding that said formal mortgages were of no force and that no liens upon the lands and premises involved existed under them.

(7.)

It was error to hold plaintiffs in error and the court bound by said former decision as the law of the case.

(8.)

After deciding that said former decision was the law of the case, and that both the court and the parties were bound thereby, — error to proceed to consider or determine as to the validity of said defense, the court being, under its decision therein, without jurisdiction so to do.

(9.)

It was error in said State supreme court to hold that said proceedings constituted due process of law, as required by sec. 1, of art. XIV of the amendments to the Constitution of the United States, and error to hold therein that thereby plaintiffs in error were not deprived of their property without due process of law.

(10.)

It was error to hold that in said proceedings these plaintiffs in error were not denied the equal protection of the laws.

(11.)

It was error to refuse to plaintiffs in error their right to be heard upon, and to present their defense predicated upon the former election made in said cause by the defendant in error to claim solely under the formal mortgages, such election having been by him persisted in after the offer to him made in open court at the trial in said cause that judgment might be therein entered without contest for the foreclosure of the equitable mortgage and for the entire amount then secured thereby, which offer was expressly refused by defendant in error, his said election having also been persisted in until after the final judgment upon appeal holding said formal mortgages void, and of no effect.

Dated November 29th 1901.

____ ____,

Attorney for Plaintiffs in Error,
Owatonna, Minnesota.

203 [Endorsed:] Assignments of error.

204 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the supreme court of the State of Minnesota, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Daniel S. Piper, plaintiff and defendant in error, and Joseph A. Sawyer and Nellie A. Sawyer, defendants and plaintiffs in error, wherein was drawn in question the validity of an authority exercised under the United States, and the decision was against the validity of the claim and authority so therein set up and asserted, and wherein was drawn in question the validity of an authority, exercised under a statute and law of said State of Minnesota on the ground that said authority, and the judgment of said supreme court of Minnesota predicated thereon, was repugnant to the Constitution of the United States, and wherein the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right, claim and privilege specially set up and claimed under and by virtue of said Constitution of the United States and said clause thereof, a manifest error hath happened to the great *danger* of the said Joseph A. Sawyer and Nellie A. Sawyer, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court at Washington, on the 30th day of December A. D. 1901 in the said Supreme Court to be then and there held: that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and Constitution of the United States, and the customs thereof, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
205 of the said Supreme Court of the United States, this 30th day of November in the year of our Lord one thousand nine hundred and one.

HENRY D. LANG,
Clerk of U. S. Circuit Court for the District of Minnesota.

Allowed by the Hon. Charles M. Start chief justice supreme court of the State of Minnesota.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

206 [Endorsed:] Writ of error.

207 THE UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

JOSEPH A. SAWYER and NELLIE A. SAWYER, Plaintiffs in Error,
vs.
DANIEL S. PIPER, Defendant in Error.

THE UNITED STATES OF AMERICA, *ss:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein the said Joseph A. Sawyer and Nellie A. Sawyer are plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as is in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of St. Paul in the State of Minnesota, this 30th day of November, A. D. 1901.

CHAS. M. START,
Chief Justice of the State of Minnesota.

Service of the foregoing citation by copy and the exhibition to us of the original signature of Charles M. Start, chief justice of the State of Minnesota, appended to the original thereof, was made at the city of Owatonna, Minnesota, on this — day of December, A. D. 1901, and is hereby admitted.

——— ———,
——— ———,
Attorneys for Daniel S. Piper, said Respondent in Error.

208 STATE OF MINNESOTA, *Supreme Court,* } *ss:*

On this — day of December, A. D. 1901, before me, the deputy, and acting, clerk of said supreme court, personally came J. A. Sawyer, to me known to be the attorney for the plaintiffs in error therein mentioned, who being by me first duly sworn, did say that on the second (2nd) day of December, A. D. 1901, at the city of Owatonna in the county of Steele and State of Minnesota, and in the office of Messrs. Wheelock & Sperry therein, he personally delivered to and left with said Wheelock & Sperry a true copy of the hereunto-attached original citation, and at said time and place exhibited to said Wheelock & Sperry said original citation and the genuine signature of Hon. Charles M. Start, chief justice of the supreme court of said State of Minnesota, thereto attached. Affiant further says that he personally knows that said Wheelock & Sperry, (with Robert Taylor, below mentioned,) have been at all times, and still are the attorneys of the within-named Daniel S. Piper, defendant in error in said cause, and that said Wheelock — Sperry are still and

now the attorneys of said Piper in other matters. Affiant further states that at said time and place he also delivered to and left with said Wheelock & Sperry a true copy of his assignments of error in said cause, and left with them that they might copy the same—a duly attested copy of the writ of error herein: And that at said office and on the 5th day of December 1901 he personally exhibited to Robert Taylor, one of the attorneys of this defendant in error, said original citation and the said signature of Hon. Charles M. Start thereto affixed.

(Signed) J. A. SAWYER.

STATE OF MINNESOTA, }
Supreme Court. }

Subscribed and sworn to before me on this — of December A. D. 1901.

[Seal of the Supreme Court, State of Minnesota.]

J. L. HELM,
Deputy Clerk Supreme Court, Minnesota.

209 [Endorsed:] Original. State of Minnesota. Supreme Court of the United States. Joseph A. Sawyer *et al.* plaintiffs in error *vs.* Daniel S. Piper defendant in error. Citation. J. A. Sawyer, attorney for pl'ffs in error, Owatonna, Minn.

210 STATE OF MINNESOTA, } *ss:*
Supreme Court, }

JOSEPH A. SAWYER and NELLIE A. SAWYER, Plaintiffs in Error and Appellants,
vs.
DANIEL S. PIPER, Defendant in Error.

I hereby certify that upon the argument in the above-entitled cause in this court the above-named appellants, by their attorneys, in support of their assignments of error in this court, numbered 8 and 9, — viz: That the court erred in depriving said appellants of their property without due process of law, and erred in denying to those appellants the equal protection of the laws, relied upon, and claimed the protection of sec. 1 of article 14, of the amendments to the Constitution of the United States, and that upon such argument appellants drew in question the said section, and claimed a deprivation of their property and lands involved in said action, contrary to the provisions of that section of said amendment to the United States Constitution.

Dated at the capitol in St. Paul, Minnesota, this 22d day of December, A. D. 1901.

CHAS. H. START,
Chief Justice Supreme Court of the State of Minnesota.

211 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, } ss:
Office of Clerk of Supreme Court, }

I, Darius F. Reese, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment-roll and all of the proceedings had in the said supreme court of the State of Minnesota in the case between Joseph A. Sawyer and Nellie A. Sawyer, appellants and plaintiffs in error, against Daniel S. Piper, respondent and defendant in error, including the opinion of the said supreme court therein, and also contains a full and complete transcript of the record, judgment, judgment-roll and all the proceedings had in said supreme court upon the former appeal in said cause, save only the copies of the four original mortgages, mortgage notes and assignments as set out *in extenso*, in the settled case therein; and also contains a full and correct transcript of all the briefs, original and reply, filed therein by these plaintiffs in error, including all their several assignments of error upon each appeal as appears from the original files and records of said supreme court of the State of Minnesota.

And I do further certify and return that I have annexed to said transcript and included therewith a copy of the petition for writ of error, and of the bond on the writ of error, and approval thereof, and the assignments of error as the same remain on file and of record in said supreme court of the State of Minnesota, and the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with admission of service thereof, and the original certificate of the chief justice that upon the oral argument there was drawn in question the validity of the former decree of this court upon the ground that the same violated the rights of the plaintiffs in error under the provisions of sec. 1 of art. 15 of the amendments to the Constitution of the United States and that
212 the same constitutes a true and complete return to said writ of error.

In witness whereof, I have hereunto set my hand and seal of said supreme court of the State of Minnesota at the capitol, at St. Paul, Minnesota this 23d day of December A. D. 1901.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court of the State of Minnesota,
By J. L. HELM,
Deputy Clerk.

213 [Endorsed:] State of Minnesota, supreme court. Joseph A. Sawyer and Nellie A. Sawyer plaintiffs in error *vs.* Daniel S. Piper defendant in error.

Endorsed on cover: File No. 18374. Minnesota supreme court. Term No. 225. Joseph A. Sawyer and Nellie A. Sawyer, plaintiffs in error, *vs.* Daniel S. Piper. Filed January 16", 1902.